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CONTRIBUTORY FAULT:

THE TORTFEASORS AND CONTRIBUTORY NEGLIGENCE ACT

Report #128

September 2013

Library and Archives Canada Cataloguing in Publication

Manitoba. Law Reform Commission
Contributory fault: The Tortfeasors and Contributory Negligence Act.

(Report; 128)
Cover title.
Includes bibliographical references.
ISBN 978-0-7711-1560-8

1. Manitoba. Tortfeasors and Contributory Negligence Act. 2. Negligence, Contributory--Manitoba. 3. Negligence, Comparative--Manitoba. 4. Joint tortfeasors--Manitoba. I. Title. II. Title: Tortfeasors and Contributory Negligence Act. III. Series: Report (Manitoba. Law Reform Commission); 128.

KEM294 M35 2013 346.712703'2 C2013-962002-8

Copies of the Commission's Reports may be ordered from Statutory Publications, 10th Floor, 55 Carlton Street, Winnipeg, MB R3C 3H8. The Commission's Reports are also available electronically at www.manitobalawreform.ca.

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The Manitoba Law Reform Commission is funded through grants from:

The Government of Manitoba

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The Manitoba Law Foundation

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ACKNOWLEDGMENTS

The Commission gratefully acknowledges the assistance of Darlene Jonsson, consultant, who prepared the Consultation Paper that preceded this final report. The Commission also expresses its thanks to those who provided submissions and comments on the Consultation Paper: Professor Philip Osborne, Professor Lewis Klar, Professor John Kleefeld, and The Canadian Medical Protective Association.

CHAPTER 1

INTRODUCTION

Tort law deals with civil wrongs, and how persons who have been injured by the wrongful conduct of others should be compensated. When the elements of a tort are established, the costs of the injury resulting from the tort are allocated between the plaintiff who suffered harm and the defendant(s) at fault. Damages are awarded in tort with the goal of placing the plaintiff in the position that he or she would have been in had the injury not occurred.

A person may be liable to compensate another under tort law as a result of his or her negligent or intentional conduct, or under principles of strict liability.[1] However, negligence is the dominant tort category in Canadian law.[2] To be liable in negligence, the defendant must have a legal duty to take care in relation to the plaintiff, the defendant must breach the duty and an injury[3] must result from the breach. The defendant must fail to meet the required standard of care – usually, the care that would be taken by a reasonable person in the circumstances.

Legal theorists generally refer to two competing concepts to explain and justify tort law. The first is the corrective justice theory, which, put simply, focuses on a defendant's responsibility for having inflicted injury and for repairing the injury inflicted. This theory centres on notions of individual responsibility, fault and causation.

The Supreme Court of Canada has explained the corrective justice theory in the following terms, in the context of a negligence action:

> Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care - a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as corrective justice assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm.[4]

An alternate theory of tort law is focused on distributive justice, or the sharing of burdens and benefits among multiple actors within a community. As Professor Ernest Weinrib explains, "Distributive justice deals with the sharing of a benefit or burden: it involves comparing the potential

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[1] "The distinguishing feature of the strict liability torts is that there is no need to prove that the defendant was guilty of any wrongful (intentional or negligent) conduct. In the absence of defences, proof that the defendant caused the plaintiff's loss in the manner prescribed is sufficient to impose liability": Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 341.

[2] *Ibid* at 23.

[3] The term 'injury' is used to encompass the broad range of harms for which damages may be payable in compensation, including personal injury, property damage, and economic loss.

[4] *Clements v Clements*, 2012 SCC 32 at para 7, citing Ernest Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 1995) at 156. The Court identified the goals of the law of negligence as compensation for injury, fairness, deterrence and corrective justice.

parties to the distribution in terms of a distributive criterion. Instead of linking one party to another as doer and sufferer, distributive justice links all parties through the benefit or burden they all share."[5]

It is important to distinguish between these two theories because they each provide a different lens through which to view the commentary and recommendations contained in this report.[6] The Commission does not propose to engage in the debate about which of these theories best explains tort law.[7] Nevertheless it is important to acknowledge that the recommendations in this report are grounded primarily in the corrective justice theory of tort law. The Commission accepts that, "...any complete explanation of tort law - whatever other considerations it may invoke - cannot but invoke considerations of corrective justice."[8] Overall, it agrees with Professor Klar's statement that, "...tort law is about corrective justice - not only in theory, but in practice. Duty, fault, cause etc. are its required elements. Plaintiffs who fail to prove these things lose."[9] The Commission's recommendations should be considered in this context.

At common law, a tort claim for a single injury was indivisible. A plaintiff who suffered a single injury caused by multiple tortfeasors had the right to recover damages for the entire loss from any tortfeasor who shared liability. A tortfeasor who paid damages to a plaintiff was not entitled to contribution from other tortfeasors, since each tortfeasor was responsible for the entire loss.

As well, contributory negligence was a complete defence to a tort action. A plaintiff whose negligent actions contributed to his or her loss was barred from recovering damages from any tortfeasor.

Legislation to alleviate the harshness of these and other common law rules relating to contribution among tortfeasors and contributory negligence was enacted in every Canadian jurisdiction in the first decades of the 20th century, beginning in Ontario in 1924. Manitoba's *Tortfeasors and Contributory Negligence Act* came into force in 1939 and has been substantively amended only twice since then, in 1973 and again in 1980. A revision of the Manitoba Act is now appropriate, given the developments in the law in the decades since the early reforms.

This report begins with an overview of the common law relating to contribution among tortfeasors and contributory negligence, the legislative and common law reforms, and the basis for apportionment of damages. Chapter 3 discusses the underlying principles of joint and several liability and proportionate liability and developments affecting these principles within Canada and internationally. Chapter 4 makes recommendations for reforms respecting the effects of the

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[5] Ernest Weinrib, "Corrective Justice in a Nutshell" (2002) 52:4 UTLJ 349 at 351.

[6] For example, in his submissions to the Commission in response to the Consultation Paper, Professor Philip Osborne points out that if tort law is viewed as a distributive system, the principle of contributory negligence operates very harshly against negligent plaintiffs vis à vis fully insured defendants: Email from Philip Osborne, April 30, 2013.

[7] Although corrective justice and distributive justice are the principal competing theories, commentators have identified additional related goals, including restoring dignity to victims, punishing wrongful conduct, educating the public and specific sectors of society, emphasizing accountability and personal responsibility and challenging powerful persons and institutions: Lewis Klar, "The Role of Fault and Policy in Negligence Law" (1996) 55 Alta L Rev 24-44; Osborne, *supra* note 1 at 12-18.

[8] John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice" (2010) 30 Law and Phil 1 at 6.

[9] Email from Lewis Klar, May 9, 2013.

plaintiff's contributory negligence on his or her right to recover damages from a wrongdoer. Chapter 5 makes recommendations for reforms with respect to the right of one wrongdoer to contribution from another wrongdoer when the wrongful conduct of both wrongdoers has caused a single loss to a plaintiff.

CHAPTER 2

OVERVIEW

A. THE COMMON LAW

1. Contribution Among Tortfeasors

As noted in the introduction, at common law, tort liability for a single injury was indivisible. A plaintiff who suffered a single injury caused by multiple tortfeasors had the right to recover damages for the entire loss from any tortfeasor who shared liability. A tortfeasor who paid damages to a plaintiff was not entitled to contribution from other tortfeasors, since each tortfeasor was responsible for the entire loss.

The origin for the rule prohibiting contribution among tortfeasors is said to be the 1799 English case of *Merryweather v Nixan*.[1] The case dealt with an intentional act committed by two tortfeasors, who took machinery from a mill. One tortfeasor paid the entire judgment and sought contribution from the other. The court held that the first tortfeasor had no right to contribution. The rationale for the decision has been said to be the principle of *ex turpi causa non oritur actio*: out of a base (illegal or immoral) consideration, no action arises.[2]

As early as 1898, however, it was argued that *Merryweather v Nixan* in fact stated the exception, applying to intentional tortfeasors, rather than the rule relating to contribution:

> The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution, *and the exception is that no assumpsit, either express or implied, will be enforced among wilful tortfeasors or wrongdoers*.[3]

The origin of some confusion in interpreting the decision may have arisen from the limited meaning of the word "tort" in 1799:

> At that time the word 'tort' had not come to be applied to the vast number of *quasi delicts* now known and classified as actions sounding in tort and arising out of mere negligence or unintentional injury. The classification of such actions as technical torts is of comparatively recent date. It is therefore, vital to a correct understanding of the decision, that this limited meaning of the word 'tort' – i.e., a wilful or intentional wrong – be remembered.[4]

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[1] *Merryweather v Nixan* (1799) 8 TR 186; 101 ER 1337.
[2] *Black's Law Dictionary*, 6th ed, *sub verbo* "ex turpi causa non oritur actio".
[3] Theodore W Reath, "Contribution Between Persons Jointly Charged for Negligence – Merryweather v Nixan" (1898) 12 Harv L Rev 176 at 177 [emphasis added]. See also William L Prosser, "Joint Torts and Several Liability" (1937) 25 Cal L Rev 413.
[4] Reath, *supra* note 3 at 178.

The Supreme Court of Canada has also commented that the common law rule may not have been absolute:

> It is often stated that at common law there was no contribution between tortfeasors, citing *Merryweather v. Nixan* (1799), 8 T.R. 186, 101 E.R. 1337. It may also be noted that in *Sparrows Point v. Greater Vancouver Water District*, 1951 CanLII 32 (SCC), [1951] S.C.R. 396, Rand J. (at p. 412), in concurring reasons, after holding that provincial contributory negligence legislation could not apply, stated that as a result of the application of common law admiralty principles, there could be no contribution. However, the arguments in favour of and against contribution between tortfeasors appear not to have been considered. Commentators have questioned whether the common law rule against contribution was absolute, particularly in cases where the tort committed was not intentional, and there was no malicious motivation. ... Like the contributory negligence bar, the idea that there can be no contribution between tortfeasors is anachronistic and not in keeping with modern notions of fairness.[5]

The rule was, however, commonly applied by courts to prohibit any contribution among tortfeasors who had contributed to a single injury.[6]

2. Contributory Negligence

At common law, a defendant had a complete defence to an action for tort if the plaintiff's own negligence had contributed to the injury. The plaintiff's negligence absolved the defendant of liability.

This rule originated with the 1809 English case of *Butterfield v Forrester*.[7] In that case, the defendant had placed a pole across a road while making home repairs. The plaintiff was riding his horse on the road at twilight at high speed and didn't see the pole. The horse struck the pole and the plaintiff suffered injuries. The jury was instructed that if Butterfield had not used ordinary care in riding they should find in favour of the defendant. The jury did so, and the case was affirmed on appeal. The plaintiff was barred from recovering damages because he did not exercise reasonable and ordinary care to avoid the injury.

As the common law continued to develop, the contributory negligence bar was held to apply even where the plaintiff's negligence was slight in comparison to the carelessness of the defendant and the seriousness of the injury suffered.[8]

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[5] *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, 158 Nfld & PEIR 269, 153 DLR (4th) 385 at para 101 [*Bow Valley Husky*].

[6] In this regard, tort law differed from contract law. In *Doiron v Caisse Populaire d'Inkerman Ltee* (1985), 61 NBR (2d) 123, 17 DLR (4th) 660, La Forest, J noted: "The important fact is that there is no authority requiring the application of absolutist common law tort notions of responsibility to contracts. Indeed, as Pigeon, J observes [in *Smith v McInnis*, [1978] 2 SCR 1357], there never developed in contract law the rigid rules against apportionment of loss that prevailed in tort law and, in fact, loss was apportioned in the rare cases where separate breaches of contract contributed to a single loss" at para 55. See also UK, Law Commission, *Law of Contract: Report on Contribution* (Report No 79, 1977) at paras 12-16.

[7] *Butterfield v Forrester* 11 East 60, 103 ER 926.

[8] *Cayzer, Irvine & Co v Carron Co* (1884), 9 App Cas 873.

Several rationales have been identified as underlying the principle at common law. Courts sought to identify a sole cause of injuries, and considered fault too uncertain a concept to make apportionment workable, although frequently the plaintiff's actions are in fact one of several causes of an injury. It was felt that a plaintiff who had been careless was simply unworthy of protection or compensation, and deserved punishment for his or her misconduct: a plaintiff was required to come to court with 'clean hands'. In an era of individualism, the principle protected the developing industrial sector from liability for the cost of accidents that accompanied economic progress, and prevented juries from succumbing to their sympathy for "the man on crutches in the courtroom".[9] The principle was also thought to act as a general deterrent, encouraging others to take care for their own safety.[10]

Eventually, however, in response to the harsh effect of the contributory negligence bar on plaintiffs, and to restrict its scope, courts developed the doctrine of 'last clear chance'. Under this doctrine, the plaintiff could recover damages if the court was satisfied that the defendant had the last clear opportunity to avoid the injury. There was still no apportionment; if the last clear chance doctrine applied, the defendant was liable for the entire amount of the damages suffered by the plaintiff.

B. LEGISLATIVE AND COMMON LAW REFORMS

Ontario was the first common law province in Canada to enact legislation alleviating the harshness of the common law rules relating to contributory negligence, in 1924.[11] The *Contributory Negligence Act* abolished the contributory negligence bar and provided for the apportionment of damages between defendant and plaintiff where the plaintiff had been contributorily negligent. The same year, the Uniform Law Conference of Canada (ULCC) proposed the *Uniform Contributory Negligence Act*,[12] based largely on the contributory negligence provisions of the United Kingdom *Maritime Conventions Act, 1911*[13] and the federal *Maritime Conventions Act, 1914*.[14]

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[9] William L Prosser "Comparative Negligence" 41 Cal L Rev 1 (1953) at 9.

[10] Allen M Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed (LexisNexis Canada Inc, 2011) at 494; Gary T Schwartz "Contributory and Comparative Negligence: A Reappraisal" (1978) 87 Yale LJ 697 at 722; Prosser, *ibid* at 3–4.

[11] *Contributory Negligence Act*, 1924, c 32. The *Civil Code of Quebec* has always provided for apportionment of fault and contribution among tortfeasors.

[12] Uniform Law Conference of Canada, *Uniform Contributory Negligence Act*, online: <http://www.qp.gov.sk.ca/documents/ULCC/1924ULCC0007.pdf>.

[13] *Maritime Conventions Act*, 1911 (UK), 1 & 2 Geo V, c 57.

[14] *Maritime Conventions Act*, SC 1914, c 13 (repealed by the *Canada Shipping Act*, RSC 1985, c S-9, itself repealed by the *Canada Shipping Act, 2001*, SC 2001, c 26). The *Maritime Conventions Act, 1914* was similar to the UK *Maritime Conventions Act, 1911*, *ibid*. The Acts gave effect to *The International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels*, adopted by the The Comité Maritime International of the International Law Association at Brussels, September 23, 1910, acceded to by Canada October 28, 1914 [Brussels Convention]. Under English admiralty law, the contributory negligence bar did not apply to collisions between ships; rather, damages were divided equally between the parties. In the case of personal injury caused by negligence, damages were apportioned according to fault. The Brussels Convention adopted the principle of liability according to fault with respect to plaintiff and tortfeasors, and this was implemented by statute in countries which were parties to the Convention. Under the Convention, *proportionate* liability applied in the case of damage to ships

In 1930, the Ontario Act was replaced by the *Negligence Act*,[15] which provided both for apportionment for contributory negligence and contribution among tortfeasors. The 1930 Act continues in effect today.

In 1935, the English *Law Reform (Married Women and Tortfeasors) Act, 1935*[16] was enacted, providing for contribution among tortfeasors, followed by the *Law Reform (Contributory Negligence) Act, 1945*.[17] The ULCC also adopted a revised *Uniform Contributory Negligence Act* in 1935 to add provisions for contribution among tortfeasors.[18]

All provinces and territories subsequently enacted legislation reforming the law relating to contributory negligence and contribution among tortfeasors, in either one or two statutes.[19] Most jurisdictions, including Manitoba, based their contributory negligence provisions on the 1930 Ontario Act and the Uniform Act. With respect to contribution among tortfeasors, Manitoba, Alberta, New Brunswick and Nova Scotia closely follow the English 1935 statute, and the remaining jurisdictions are based more closely on the Ontario and Uniform Act models.

Overall, the Canadian statutes have been described as "generally an amalgamation of provisions based on the *Maritime Conventions Act*, which specifies for individual assessment of fault without solidary liability and without contribution [in the case of damage to ships or property], with those derived from the 1935 Act, which assumes solidary obligation and specifically enables contribution".[20]

In 1979, the Institute for Law Research and Reform of Alberta issued Report #31, *Concurrent Contributory Negligence and Wrongdoers*,[21] proposing a number of reforms to the Alberta Act. This was followed in 1984 by the adoption of a new *Uniform Contributory Fault Act*[22] by the Uniform Law Conference of Canada. The Uniform Act is based very closely on the draft Act recommended in the Alberta Report. It has not been implemented in any jurisdiction.

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or property, and *joint and several* liability applied with respect to third parties in the case of death or personal injury, subject to a right of contribution.

[15] *Negligence Act*, RSO 1990, c N.1.

[16] *Law Reform (Married Women and Tortfeasors) Act*, 1935 (UK), 25 & 26 Geo V, c 30.

[17] *Law Reform (Contributory Negligence)* Act, 1945 (UK), 8 & 9 Geo VI, c 28.

[18] *Supra* note 12.

[19] *The Tortfeasors and Contributory Negligence Act*, RSM 1987, c T90; *Contributory Negligence Act*, RSA 2000, c C-27; *Tortfeasors Act*, RSA 2000, T-5; *Negligence Act*, RSBC 1996, c 333; *Contributory Negligence Act*, RSNB 2011, c 131; *Tortfeasors Act*, RSNB 2011, c 231; *Contributory Negligence Act*, RSNL 1990, c C-33; *Contributory Negligence Act*, RSNWT 1988, c C-18; *Contributory Negligence Act*, RSNS 1989, c 95; *Tortfeasors Act*, RSNS 1989, c 471; *Contributory Negligence Act* (Nunavut), RSNWT 1988, c C-18; *Negligence Act*, RSO 1990, c N.1; *Contributory Negligence Act*, RSPEI 1988, c C-21; *Civil Code of Quebec*, Art. 1478 CCQ; *Contributory Negligence Act*, RSS 1978, c C-31; and *Contributory Negligence Act*, RSY 1986, c 32.

[20] *Barisic v Devenport*, [1978] 2 NSWLR 111 at 146-7. The terms "solidary liability" and "solidary obligation" refer to joint and several liability, or at common law, liability *in solidum*. Under this principle, wrongdoers whose actions have combined to cause a single indivisible loss are each liable to the injured person for the full amount of the damage suffered. See the discussion at pages 10-11 below.

[21] Institute for Law Research and Reform of Alberta, *Concurrent Contributory Negligence and Wrongdoers* (Report No 31, 1979) [Alberta Report].

[22] Uniform Law Conference of Canada, *Uniform Contributory Fault Act*, online: <http://www.qp.govsk.ca/documents/ULCC/1984ULCC0066.pdf> [Uniform Act].

The Ontario Law Reform Commission also carried out a comprehensive study in this area, and in 1988 released its *Report on Contribution Among Wrongdoers and Contributory Negligence*.[23] Subsequent Canadian law reform reports have addressed more discrete subject areas.[24]

Although reformed by provincial legislation for matters within provincial jurisdiction, the common law principles relating to contributory negligence and contribution among tortfeasors continued to apply with respect to most maritime matters until 1997.[25] In *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*,[26] the Supreme Court of Canada confirmed that as a matter of constitutional law, provincial negligence statutes do not apply to maritime negligence claims. In the absence of federal legislation, common law principles of maritime law applied. At maritime common law, contributory negligence was a complete bar to recovery in a negligence claim and contribution among tortfeasors contributing to a single injury was not recognized.[27]

However, the Court held that this was an appropriate area for judicial reform of the law:

> The considerations on which the contributory negligence bar was based no longer comport with the modern view of fairness and justice. Tort law no longer accepts the traditional theory underpinning the contributory negligence bar that the injured party cannot prove that the tortfeasor "caused" the damage. The contributory negligence bar results in manifest unfairness, particularly where the negligence of the injured party is slight in comparison with the negligence of others. Nor does the contributory negligence bar further the goal of modern tort law of encouraging care and vigilance. So long as an injured party can be shown to be marginally at fault, a tortfeasor's conduct, no matter how egregious, goes unpunished.[28]

With respect to contribution among tortfeasors, the Court observed that "[l]ike the contributory negligence bar, the idea that there can be no contribution between tortfeasors is anachronistic and not in keeping with modern notions of fairness".[29]

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[23] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) [Ontario Report].

[24] *Ibid*; Alberta Report, *supra* note 21; Law Reform Commission of British Columbia, *Report on Shared Liability* (Report No 88, 1986); Alberta Law Reform Institute, *Last Clear Chance Rule* (Report No 75, 1997); Law Reform Commission of Saskatchewan, *The Insolidum Doctrine and Contributory Negligence* (1998); Law Reform Commission of Nova Scotia, *Joint Tortfeasors and the Common Law "Release Bar Rule"* (July 2002); Law Commission of Ontario, *Joint and Several Liability Under the Ontario Business Corporations Act*, (February, 2011).

[25] As noted above, the law was reformed with respect to collisions between ships by the *Maritime Conventions Act*, 1914, *supra* note 14.

[26] *Bow Valley Husky*, *supra* note 5.

[27] *Toronto Transportation Commission v The King*, [1949] SCR 510; *Gartland Steamship v The Queen*, [1960] SCR 315; *Fraser River Harbour Commission v The "Hiro Maru"*, [1974] FC 490 (TD).

[28] *Bow Valley Husky*, *supra* note 5 at para 94.

[29] *Bow Valley Husky*, *supra* note 5 at para 101. A common law contribution claim is supported only if the third party is directly liable to the plaintiff: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45. This principle also applies under apportionment legislation: see *Preston (Guardian of) v Chow*, 2002 MBCA 34, 211 DLR (4th) 758; *Raymond v Asper*, 2002 MBQB 21, 161 Man R (2d) 309; *Dominion Chain Co Ltd v Eastern Construction Co Ltd* (1976), 12 OR (2d) 201 (CA); aff'd [1978] 2 SCR 1346 (SCC).

As a result, the Court took the opportunity to reform maritime common law to provide for the apportionment of liability between tortfeasors and plaintiff according to fault, joint and several liability of tortfeasors and a right of contribution among tortfeasors.[30]

In 2001, the federal government endorsed these reforms with the enactment of the *Marine Liability Act*.[31] Among many other matters dealt with, the Act provides for the apportionment of liability among tortfeasors and plaintiff, joint and several liability among tortfeasors in most cases,[32] and a right of contribution among tortfeasors in accordance with their degree of fault. The Act also expressly abolishes the last clear chance rule and preserves the contractual rights of tortfeasors with respect to contribution and indemnity.

C. REFORM OF *THE TORTFEASORS AND CONTRIBUTORY NEGLIGENCE ACT*

The Manitoba *Tortfeasors and Contributory Negligence Act*, like the other Canadian apportionment statutes, was enacted in response to concerns about specific tort doctrines that had evolved at common law. Its language and concepts, particularly with respect to contribution among tortfeasors, are outdated and in some respects have been overtaken by other Manitoba legislation and developments in the case law. Further, it is time to explicitly recognize that the central purpose of apportionment legislation in modern times is to promote fairness and justice between the parties. Changes should be made that will allow the courts to more effectively carry out this purpose.

In this report, the Commission recommends changes to the law that members feel will better accomplish the Act's modern purpose and enable the courts to assess in each case how fairness and justice may best be achieved. The Uniform Law Conference *Uniform Contributory Fault Act* has a clear and simple structure and is an appropriate model for the new Act, with modifications as appropriate and required by the Commission's recommendations.

The Commission recommends that *The Tortfeasors and Contributory Negligence Act* be repealed and replaced with a new Act in accordance with the recommendations in this report. For consistency with the substance of the Commission's recommendations, the new Act should be entitled *The Contributory Fault Act*.

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[30] See also *Ordon v Grail*, [1998] 3 SCR 437.

[31] *Marine Liability Act*, SC 2001, c 6.

[32] The *Marine Liability Act* provides for *proportionate* liability in certain cases of contributory negligence, largely consistent with the Brussels Convention, *supra* note 14. Under the *Act*, proportionate liability applies in matters of navigation and shipping where a loss is caused by two or more ships and the claim is for loss to one of those ships, loss to cargo or property on board or loss of earnings. In the earlier federal statutes, this implementation of Article 4 of the Brussels Convention with respect to proportionate liability was not completely clear: see *Bow Valley Husky*, *supra* note 5 at para 99. *Joint and several* liability applies under the Act in other cases - in respect of loss caused by the fault of persons, loss suffered by ships not at fault and cases of death or personal injury. The Act departs slightly from the Brussels Convention by restricting proportionate liability for ship or property loss to the ships at fault. Joint and several liability applies in respect of these losses to ships not at fault.

RECOMMENDATION 1

The Tortfeasors and Contributory Negligence Act *should be repealed and replaced with a new* Contributory Fault Act.

D. THE BASIS FOR APPORTIONMENT

There is a debate in Canada as to whether apportionment of damages should be based on the parties' relative blameworthiness, or on the extent to which their actions or omissions caused the plaintiff's damage. Although this problem is most frequently discussed in the context of contributory negligence, the basis for apportionment of damages is also relevant to contribution among tortfeasors. It is important to clarify the Commission's views on this issue, as it underlies many of the recommendations that follow.

The predominant view in Canada, and that expressed in the Consultation Report, is that apportionment between tortfeasor and plaintiff or among multiple tortfeasors should be based on the comparative blameworthiness of the parties' actions.[33] Blameworthiness in this sense refers to the extent to which the party's behaviour falls short of the standard that was required of the person in the circumstances.

Under this approach, causation is viewed as a threshold which must be crossed before apportionment becomes an issue. Thus, the court must assure itself that each party's conduct was factually and legally a cause of the injuries. Once that test has been met, the inquiry turns to the relative fault or blameworthiness of each party.[34]

A competing idea is that apportionment ought to be based, at least in part, on the causal effects of the party's conduct.[35] This view is closer to the approach taken in both England and Australia, where the relevant legislation has been interpreted as requiring a consideration of both blameworthiness and the relative causal significance of the parties' conduct.[36]

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[33] See Lewis Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 544; *Cempel v Harrison Hot Springs* (1997) 43 BCLR (3d) 219 (BCCA); *Braun Estate v Vaughan* [2003] 3 WWR 465 (MBCA); *Heller v Martens* 2002 ABCA 122, 213 DLR (4th) 124; *Rizzi v Mavros*, 2008 ONCA 172.

[34] See David Cheifetz, *Apportionment of Fault in Tort* (Toronto: Canada Law Book, 1981) at 99.

[35] See Gerald H.L. Fridman et al, *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 2010) at 473: " ...it would seem sensible...to allow courts the flexibility to consider both causation and blameworthiness - with more weight on the latter - in performing what is already an inherently imprecise exercise in apportioning fault between the plaintiff and the defendant".

[36] Section 1(1) of the *Law Reform (Contributory Negligence) Act, 1945* provides that, in cases of contributory negligence, "the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." This language has been interpreted as requiring a consideration of the causative potency of a particular factor in addition to its blameworthiness: *Davies v Swan Motor Co (Swansea)* [1949] 2KB 291 at 326. Section 2(2) of the *Civil Liability (Contribution) Act, 1978* uses similar language, providing that contribution recoverable between persons who are both liable for the same damage shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question. Courts have found that this section also requires a consideration of both fault and causation: *Downs v Chappell* [1997] 1 WLR 426. See also Michael A Jones & Anthony M Dugdale, eds, *Clerk and Lindsell on Torts*, 20th ed (London: Sweet & Maxwell, 2010) at para 4-29; Paul

Under this approach, causation is still a threshold issue in the sense that the conduct of both parties must be a legal and factual cause of the injuries. Once that is established, the court will consider questions of both blameworthiness and causation in apportioning damages.

Most authorities agree that apportioning damages strictly on the basis of either blameworthiness or causation is a difficult exercise. In practice, the courts appear to apply a large degree of common sense to the inquiry. Apportionment is left mainly to the discretion of the trial judge, with appellate courts being unwilling to interfere in such decisions.

This issue is often discussed in the context of motor vehicle accident cases, where the plaintiff's failure to wear a seat belt has contributed to his or her injuries. In these circumstances, assessing the relative blameworthiness or causal relevance of the parties' conduct is particularly difficult. In many such cases, courts in Canada and England have adopted a practical approach, limiting the plaintiff's responsibility to 25% of the overall damages, or adopting a range of percentages by which the damages ought to be reduced.[37]

The language in Manitoba's Act does not help to resolve the debate. Section 2(2) of the Act, regarding contribution among tortfeasors, refers to the extent of a person's responsibility for the damage as the basis for apportionment. This language is similar to that used in English and Australian statutes, which has been interpreted as requiring consideration of both blameworthiness and causation.

By contrast, section 4 of the Act, concerning contributory negligence, refers to the degree of negligence found against the parties as the basis for apportionment. This language seems to invoke strictly considerations of comparative blameworthiness.

The Commission believes that the Act should be clear and consistent as to the basis for apportionment, both in respect of contribution among tortfeasors and contributory fault on the part of plaintiffs. In the Consultation Paper, the Commission recommended that the Act be clear that apportionment of damages for contributory fault should be based on the comparative blameworthiness of the parties' conduct.[38] On reflection, the Commission has concluded that a more flexible approach is warranted. As indicated in the previous section, the modern purpose of apportionment legislation is to promote fairness and justice between the parties. Apportionment based on both blameworthiness and causation, as the court finds just and equitable, will help to promote this statutory purpose in all cases.

Vout, *Torts: The Laws of Australia*, 2d ed (Sydney: Thomson Reuters, 2007) at para 33.9.850; Francis Trinidade et al, *The Law of Torts in Australia*, 4th ed (Melbourne:Oxford University Press, 2007) at 690, 813.

[37] See *Froom and Others v Butcher* , [1976] 1 QB 286.

[38] Manitoba Law Reform Commission, *Contributory Fault: The Tortfeasors and Contributory Negligence Act, Report for Consultation* (Winnipeg, April 2013), Provisional Recommendation 9.

RECOMMENDATION 2

Apportionment under the Act should be based on the relative blameworthiness and causal relevance of the person's conduct, as the court finds just and equitable.

CHAPTER 3

JOINT AND SEVERAL VS PROPORTIONATE LIABILITY

A. LIABILITY PRINCIPLES

'Joint and several liability' in this report refers to the common law principle that tortfeasors who have combined to cause a single indivisible loss are each liable to the injured person for the full amount of the damage suffered (at common law, liability *in solidum*). Where the actions of one or more tortfeasors cause or contribute to a single injury, the tortfeasors are said to be 'concurrent'.[1]

The Tortfeasors and Contributory Negligence Act and equivalent Canadian statutes preserve this common law principle, and modify it to allow a tortfeasor who compensates a plaintiff to then seek contribution from the other liable tortfeasors in accordance with their proportion of fault. As described by the Supreme Court of Canada in *Clements*:

> In some cases, an injury -- the loss for which the plaintiff claims compensation -- may flow from a number of different negligent acts committed by different actors, each of which is a necessary or "but for" cause of the injury. In such cases, the defendants are said to be jointly and severally liable. The judge or jury then apportions liability according to the degree of fault of each defendant pursuant to contributory negligence legislation.[2]

The rationale for joint and several liability for concurrent tortfeasors at common law was well summarized by the Illinois Supreme Court. The concurrent tortfeasor is liable for the entire injury because he or she was a cause of the entire injury:

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[1] 'Joint and several liability' should not be confused with the concept of 'joint tortfeasors'. Concurrent tortfeasors, whose actions combine to cause a single injury, may be either joint tortfeasors or several tortfeasors. Persons are joint tortfeasors where one is the principal of or is vicariously responsible for the other, a duty imposed jointly upon both tortfeasors is not performed or there is a concerted action to a common end: see *BPB v MMB*, 2009 BCCA 365 at para 107, leave to appeal to SCC refused [2010] SCCA No 90, and Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stevens, 1951) at 1. Tortfeasors who are not 'joint' are 'several'. The actions of several tortfeasors may cause different damage or may combine to produce the same damage. The main distinction at common law between joint tortfeasors and several concurrent tortfeasors was a matter of procedure. At common law, a plaintiff was required to claim against all joint tortfeasors in the same proceeding. A judgment against one joint tortfeasor discharged all joint tortfeasors, whether or not the first tortfeasor actually satisfied the judgment. If the tortfeasors were concurrent but several, the plaintiff was not able to join them in a single action and was forced to undertake separate proceedings. Joinder of parties is now dealt with by the *Court of Queen's Bench Rules*, Man Reg 553/88, Rules 5.02-5.05.

[2] *Clements v Clements*, 2012 SCC 32 at para 7. Concurrent torts are not required to be concurrent in time to attract joint and several liability: *Economy Foods & Hardware Ltd v Klassen*, 2001 MBCA 16, (2001) 196 DLR (4th) 413; *Lawson v Viersen*, ONCA 2012. In *Economy Foods*, Kroft, JA said: "I have concluded from the academic writings that there is, in fact, general agreement amongst the authors that in situations like ours, liability can only be treated as non-concurrent where it is feasible *both* to split up the damage into identifiable parts *and* to attribute the separate parts as being caused solely by one defendant or the other", at para 28.

> Such an "independent concurring tortfeasor" is not held liable for the entirety of a plaintiff's injury because he or she is responsible for the actions of the other individuals who contribute to the plaintiff's injury. Rather, an independent, concurring tortfeasor is held jointly and severally liable because the plaintiff's injury cannot be divided into separate portions, and because the tortfeasor fulfills the standard elements of tort liability, i.e., his or her tortious conduct was an actual and proximate cause of the plaintiff's injury. The fact that another individual also tortiously contributes to the plaintiff's injury does not alter the independent, concurring tortfeasor's responsibility for the entirety of the injury which he or she actually and proximately caused.
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> The notion of divided responsibility among independent, concurring tortfeasors should not arise until those defendants attempt to apportion liability among themselves. At this phase, the contribution phase, courts should examine the comparative liability of those whom the jury has found to have been a substantial factor in causing an indivisible injury and to have breached a duty to another. At the contribution phase, courts can compare apples to apples and afford an opportunity to divide between the wrongdoers their share of responsibility.[3]

Joint and several liability may be contrasted with 'proportionate liability', in which each defendant is liable to the plaintiff only for the proportion of the injury that is consistent with that defendant's degree of fault. It follows that a right of contribution among defendants is then unnecessary.

The Commission is not aware of any suggestion that there is a compelling need for reform to the principles of joint and several liability in Manitoba. However, these principles are central to *The Tortfeasors and Contributory Negligence Act* and to any reform initiatives in this area. Over the years, several Canadian and international law reform bodies have had occasion to review the question of whether joint and several (*in solidum*) liability should be preserved or a system of proportionate liability adopted. A brief review of these developments and of the underlying issues considered seems appropriate.

The Supreme Court of Canada has suggested that joint and several liability, with the right of apportionment as created by provincial legislation, is consistent with general tort law principles:

> The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.[4]

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[3] *Woods v Cole* (1998), 181 Ill 2d 512, 230 Ill Dec 204, 693 NE 2d 333 at paras 29-30 [citations omitted].

[4] *Athey v Leonati*, [1996] 3 SCR 458, 140 DLR (4th) 235 at para 22. However, the Court commented at para 23, that apportionment between tortious and non-tortious causes is contrary to tort law principles "because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence". Note that apportionment is based on the comparative blameworthiness of the parties' actions, not on causation: *Cempel v Harrison Hot Springs Hotel Ltd* (1997), 43 BCLR (3d) 219 (BCCA); *Snushall v Fulsang* (2005), 78 OR (3d) 142 (CA); *R A Beamish Stores Co Ltd v F W Argue Ltd* (1966), 57

The question of whether joint and several liability or proportionate liability is preferable primarily turns on one's view of whether the plaintiff or the tortfeasors should bear the risk of non-recovery from one or more of the tortfeasors for the plaintiff's injury.

At common law, tort law's dominant objective is to obtain full compensation for the plaintiff's loss. Where there are multiple tortfeasors, the optimal outcome under either a joint and several liability or a proportionate liability regime is that each tortfeasor compensates the plaintiff in proportion to that tortfeasor's level of fault. However, in every case, some risk exists that the share of one or more of the tortfeasors will be uncollectable.

Under the current legislation, each tortfeasor at fault for an indivisible injury is fully liable to the plaintiff for the injury, and each bears the risk that he or she may not be able to recover the share that should be borne by other tortfeasors. Under a proportionate liability regime, a tortfeasor is protected from the risk of non-recovery from other tortfeasors, and the plaintiff bears the risk of not receiving full compensation for his or her injury.

The New Zealand Law Commission recently reviewed the concept of joint and several liability, following a reference from the Minister Responsible for the Law Commission. The Law Commission noted that the two forms of liability also differ with respect to which party must bear the cost of determining who caused the plaintiff's loss.

> ... [J]oint and several liability requires liable defendants to apply in Court for contribution from other defendants if they wish to achieve fair apportionment between defendants. In contrast proportionate liability requires the plaintiff to claim and prove a percentage or share of their loss from each defendant, who may of course contest both their liability and the appropriate share.
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> ...
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> In short, there are two propositions. In joint and several liability it is sufficient for the claimant to identify one or more parties who are responsible for the same loss. They will be able to recover the full amount of the damages from any one of them, though they cannot secure more than the total assessed. The defendant can then claim a proportionate share from all other liable defendants who have contributed to the damage. In proportionate liability the plaintiff has to identify all the defendants and claim a proportionate share from each of them.[5]

DLR (2d) 691 (Ont CA); *Saint John Regional Hospital v Comeau*, 2001 NBCA 113, 244 NBR (2d) 201; *Fillier v Whittom* (1995), 171 NBR (2d) 92; *Alberta Wheat Pool v Northwest Pile Driving Ltd* (2000), 80 BCLR (3d) 153 (CA); *Martin v Listowel Memorial Hospital* (2000), 51 OR (3d) 384 (CA); *Mortimer v Cameron* (1994), 17 OR (3d) 1 (CA); *Clyke v Blenkhorn* (1958), 13 DLR (2d) 293 (NSCA); *Leddicote v Nova Scotia (Attorney General)*, 2002 NSCA 47, 203 NSR (2d) 271; *Rizzi v Marvos*, 2008 ONCA 172, 236 OAC 4; *Heller v Martens*, 2002 ABCA 122, 303 AR 84; *Vigoren v Nystuen*, 2006 SKCA 47, 266 DLR (4th) 634.

[5] NZ, Law Commission, *Review of Joint and Several Liability* (Issues Paper No 32, 2012) at paras 1.4, 1.6, online: <http://ip32.publications.lawcom.govt.nz>.

As a result, the plaintiff will have an incentive to join as many defendants as possible under a scheme of proportionate liability, and a defendant will have that incentive under a scheme of joint and several liability.

Debates regarding joint and several versus proportionate liability tend to centre on the relative fairness of each scheme for various categories of plaintiff and tortfeasor and the impact of each scheme on matters of broader concern to the public generally, particularly the impact and availability of insurance within different business sectors. The concept of proportionate liability tends to be strongly supported by insurers and by other potential 'deep pocket defendants', such as municipalities, professional associations and businesses related to the construction industry, who may be required to pay a large proportion of the total damages awarded to a plaintiff when other liable tortfeasors are unable to pay. Events regarded as crises in the construction and financial sectors in some countries have resulted in businesses and advisors seeking to decrease their exposure to multiple plaintiffs.[6] On the other side are supporters of joint and several liability who argue that since each tortfeasor is in fact liable for the entire injury, one tortfeasor should not benefit (under proportionate liability) from, and the plaintiff be penalized by, the fact that there are others who are also liable. The principles of fairness and balance require a scheme that ensures that, as between a tortfeasor at fault and an innocent plaintiff, the plaintiff does not bear the risk of undercompensation.

1. Canada

In Canada, the Institute for Law Research and Reform of Alberta,[7] the Ontario Law Reform Commission,[8] the Law Reform Commission of Saskatchewan,[9] and the Law Commission of Ontario[10] have each studied the merits of joint and several versus proportionate liability, and have recommended that the law of joint and several liability be retained. The Saskatchewan Law Reform Commission reported as follows:

> The Commission has tentatively concluded that the basic principle of the existing contribution rules is sound. We begin with the premise that the law of negligence must ultimately be judged as a social and economic institution. In our view, the economic and social costs of shifting the burden of an insolvent co-defendant onto injured parties is less acceptable than shifting it onto co-defendants who are able to assume full responsibility for the harm they contributed to. Neither approach can be regarded

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[6] For example, leaky condos in British Columbia, the 'leaky home' crisis in New Zealand and the collapse of an insurer in Australia in 2002. The New Zealand Law Commission notes that analyses of the leaky home crisis show that the majority of costs continue to fall on homeowners, however. The majority of problems go unrecognized or untreated, and if they eventually lead to structural failure the limitation applying to any claim is likely to have expired: *ibid* at para 5.13.

[7] Institute for Law Research and Reform of Alberta, *Concurrent Contributory Negligence and Wrongdoers* (Report No 31, 1979) [Alberta Report].

[8] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) [Ontario Report].

[9] Law Reform Commission of Saskatchewan, *The Insolidum Doctrine and Contributory Negligence* (1998) [Saskatchewan Report].

[10] Law Commission of Ontario, *Joint and Several Liability Under the Ontario Business Corporations Act* (February, 2011).

> as entirely fair in the abstract. But, as a matter of policy, a choice must be made. ... Our review of studies of the impact of the contribution rules on insurance costs does not suggest that the rules result in significantly higher liability insurance premiums.[11]

There is a level of proportionate liability in British Columbia. In that province, courts have interpreted the wording of the *Negligence Act* so that a defendant's liability is proportionate if the plaintiff is contributorily negligent and joint and several if the plaintiff is not.[12] However, this interpretation has not been applied to the legislation of most other provinces and territories.[13] For example, in relation to the Ontario Act, the Supreme Court of Canada said:

> The purpose of a regime which imposes joint and several liability on multiple defendants is to ensure that plaintiffs receive actual compensation for their loss. Given the wording of the Ontario *Negligence Act*, I can see no reason to deny this benefit to a plaintiff who contributes to his or her loss. His or her responsibility for the loss is accounted for in the apportionment of fault. There is no reason to account for it again by denying him or her the benefit of a scheme of joint and several liability when the wording of the legislation does not intend it to be so.[14]

In a 1986 report, the former Law Reform Commission of British Columbia recommended that the British Columbia Act be amended to abolish the distinction in favour of joint and several liability.[15]

Although the cost and availability of insurance for potential defendants is frequently raised as a reason for considering a system of proportionate liability, the Alberta Court of Appeal has commented that a change to proportionate liability could have insurance implications for potential plaintiffs. In *Campbell Estate v Calgary Power Ltd*, the Court rejected the British Columbia interpretation:

> The custom of joint and several liability has stood for half a century. Those who buy or refrain from buying liability insurance have relied on it, and so have insurers who set premiums. Auto insurance is compulsory; if Alberta law were changed as requested, Albertans might need either compulsory uninsured motorist coverage or higher compulsory limits. So if any change is due (which I doubt), the Legislature should enact it.[16]

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[11] Saskatchewan Report, *supra* note 9 at 3.

[12] *Leischner v West Kootenay Power & Light Co*, [1986] 3 WWR 97, 24 DLR (4th) 641 (BCCA); *Cominco Ltd v CGE* (1984), 4 DLR (4th) 186, 50 BCLR 145 (BCCA). This also appears to be the law in Nova Scotia: *Inglis Ltd v South Shore Sales and Service Ltd* (1979), 104 DLR(3d) 507 (NSCA). See also *Campbell Estate v Calgary Power*, 1988 ABCA 281, 89 AR 293, rejecting the argument that the BC interpretation should be adopted in Alberta.

[13] In *Barisic v Devenport*, [1978] 2 NSWLR 111 at 149, the New South Wales Court of Appeal agreed with the Institute of Law Research and Reform of Alberta that this was the correct interpretation of the BC Act: Institute of Law Research and Reform of Alberta, *Contributory Negligence and Concurrent Tortfeasors* (Working Paper, 1975). The Court suggested that the interpretation may also be available with respect to the Saskatchewan Act.

[14] *Ingles v Tutkaluk Construction Ltd*, 2000 SCC 12, [2000] 1 SCR 298 at para 59. The Court held that in cases of contributory negligence the proper approach is "to first reduce the extent of the recoverable damages in proportion with the plaintiff's negligence, and then to apportion the remaining damages between the defendants, in accordance with their fault" at para 55.

[15] Law Reform Commission of British Columbia, *Report on Shared Liability* (Report No 88, 1986) at 20 [BC Report].

[16] *Campbell Estate v Calgary Power Ltd*, *supra* note 12 at para 31.

Some studies within Canada and by international bodies have distinguished between liability for economic loss and liability for personal injury, a concept that dates back to English admiralty law.[17] Reports by the Toronto Stock Exchange,[18] the Ontario Securities Commission[19] and the Standing Senate Committee on Banking, Trade and Commerce,[20] have recommended the implementation of proportionate liability for economic loss in certain circumstances.

In 1998, the Standing Senate Committee on Banking, Trade and Commerce reported on a review of joint and several liability as it applies to professional defendants, the provision of financial information and resulting economic loss:

> That the law should strive to compensate fully plaintiffs who suffer personal injury is beyond dispute. This premise was never challenged by any of the witnesses appearing before the Committee. It is not clear, though, that financial loss needs to be protected in the same way.[21]

The Committee concluded, among other things, that joint and several liability appeared to have a negative impact on the accounting profession, and consequently could have adverse implications for the financial reporting system and capital markets, and that it encourages plaintiffs to target 'deep pocket' defendants. As well, anecdotal evidence suggested that it appeared to raise the cost and limit the availability of liability insurance for auditors and other professionals.

The Committee recommended a modified proportionate liability regime limited to claims for economic loss arising by reason of errors or omissions in financial information issued under federal business, banking and insurance legislation. Joint and several liability would continue in respect of claims made by 'unsophisticated plaintiffs' and for claims arising out of fraudulent or dishonest conduct. The Committee rejected suggestions that it broaden the scope of its review to all professional services, noting that it had not heard sufficient evidence on the matter and "there is little or no evidence of a liability crisis extending beyond the scope of the provision of financial information".[22] The Committee also remained concerned about adopting a regime that would transfer to sophisticated plaintiffs the entire risk of insolvency of one or more defendants,

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[17] The concept continues to apply to some extent in maritime matters: *Marine Liability Act*, SC 2001, c 6, s 17.

[18] Toronto Stock Exchange, Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance* (March 1997). The Committee recommended the creation of a statutory civil liability regime for misrepresentations in secondary market disclosure. This was implemented by amendments to the Ontario *Securities Act*, RSO 1990, c S5, in effect December 31, 2005. Under s 138.6, liability is proportionate unless the defendant knowingly participated in a misrepresentation, in which case liability is joint and several. Similar amendments have been made to securities legislation in Manitoba and other provinces: see *The Securities Act*, CCSM c S50, s 189.

[19] Ontario Securities Commission Task Force on Small Business Financing, *Final Report* (October 1996). The Task Force recommended proportionate liability for auditors in a statutory civil action for misrepresentation in an offering document prepared using the Small Business Prospectus Form. Joint and several liability would apply in the case of an intentional misrepresentation or delay in disclosure.

[20] Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Joint and Several Liability and Professional Defendants* (March 1998) online: <http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/bank-e/rep-e/report09mar98-e.htm>.

[21] *Ibid* at "Part II: Should Joint and Several Liability Be Maintained?".

[22] *Ibid* at "Part III -- What Type of Liability Regime Should Replace Joint and Several Liability?".

and recommended that the federal government undertake consultations to determine how that risk could be reallocated between the plaintiff and the remaining defendants.[23]

In 2002, the Attorney General of British Columbia released a consultation paper entitled *Civil Liability Review*, to "address whether our current civil liability regime meets tort law goals in a manner that is fair and rational".[24] Among the areas identified for possible legislative reform was the principle of joint and several liability in the *Negligence Act*. The consultation paper initiated some controversy within the province. The Law Society of British Columbia responded as follows:

> The consultation paper offers no evidence indicating there to be a crisis in BC arising out of "at-fault" defendants being held jointly and severally liable to an innocent plaintiff. If a plaintiff is innocent of any wrongdoing and the defendant is found negligent resulting in a loss to the plaintiff, the present law reasonably places the burden of seeking indemnity from co-defendants on an at-fault defendant rather than on a blameless plaintiff.
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> It is not clear that it is in the public interest to change the system to make innocent plaintiffs bear the risk of a defendant's insolvency. In the absence of evidence that the current law is not operating well, it is difficult to postulate on possible alternatives for reform. If government's concern is with a particular industry (for example, insolvent defendants in the construction industry) consideration could instead be given to legislative changes in the industry concerned, rather than re-writing the law of negligence as a whole. For example, it may make more sense for government to consider introducing requirements for performance bonds or mandatory minimum insurance rather than embarking on a general revision to the law of joint and several liability.
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> Because of a lack of any evidence suggesting a pressing need for reform, the Law Society is concerned that many more problems than solutions may be created arising from ill-considered reform and that such solutions may well not be in the public interest.[25]

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[23] *Ibid.* The Committee suggested that the US *Private Securities Litigation Reform Act of 1995* be used as a starting point for consultations. The *Canada Business Corporations Act*, RSC 1985, c C-44 was amended in 2001 to introduce a modified proportionate liability regime for errors or omissions in the provision of financial information. The Act also provides for reallocation of uncollectable damages among other defendants in proportion to their degree of responsibility for the loss, subject to a cap of 50 percent of the original amount that a defendant was ordered to pay. Joint and several liability continues to apply where the plaintiff's financial interest in the corporation is less than $20,000, a defendant acts fraudulently or dishonestly or the court considers it just and reasonable.

[24] Hon Geoff Plant, British Columbia Attorney General, "Civil Liability Review", *Bar Talk* (The Canadian Bar Association, June 2002) online: < http://www.cba.org/bc/bartalk_01_05/06_02/guest_plant.aspx>.

[25] Law Society of British Columbia, *Letter to the Attorney General - Access to justice at stake in government's civil liability review* (September 23, 2002) online: <http://www.lawsociety.bc.ca/page.cfm?cid=2094&t=Access-to-justice-at-stake-in-government's-civil-liability-review>.

2. International Developments

Several Australian jurisdictions have had systems of proportionate liability for non-personal injury claims relating to defective buildings since the 1990s.[26] In 1995, an inquiry established by the Commonwealth and New South Wales Attorneys General recommended that joint and several liability also be replaced with a system of proportionate liability for actions in negligence for property damage or economic loss and for contraventions of statutory provisions regarding misleading conduct.[27] However, an expert report commissioned by the Victorian Attorney General's Law Reform Advisory Council concluded in 1998 that "there is no clear economic or other justification for a wholesale shift to a system of proportionate liability".[28] A similar conclusion was reached by the New Zealand Law Commission in 1998[29] and the New South Wales Law Reform Commission, which recommended against the introduction of proportionate liability in 1999.[30]

These events were followed in Australia in 2001 by the collapse of an insurer holding 35% of the professional indemnity insurance market. According to the Standing Committee of Attorneys General, professional and community groups "were facing serious difficulties accessing affordable professional indemnity or public liability insurance, with premiums rising, fewer insurers offering the products and restrictions being placed on the scope of cover being offered".[31] A corporate law policy paper issued by the Commonwealth government in 2002 recommended that proportionate liability be introduced in relation to economic loss and property damage.[32] The same year, the Commonwealth Government established a panel to review the law of negligence, and to "develop proposals to replace joint and several liability with proportionate liability in relation to personal injury and death, so that if a defendant is only partially responsible for damage, they do not have to bear the whole loss".[33] The panel did not review liability for matters relating to economic loss. In its final report, the panel stated that it was

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[26] *Building Act 1993* (Vic), ss 129-131 (repealed; proportionate liability provisions included in the *Wrongs Act 1958*); *Development Act 1993* (SA) s 72; *Building Act 1993* (NT) s 155 (repealed; proportionate liability provisions included in the *Proportionate Liability Act 2005*); *Building Act 2004* (ACT), s 141; *Building Act 2000* (Tas), s 252; *Environmental Planning and Assessment Act, 1979* (NSW), s 109ZJ (repealed; proportionate liability provisions included in the *Civil Liability Act 2002*).

[27] Austl, Commonwealth, *Inquiry Into the Law of Joint and Several Liability: Report of Stage Two* by JLR Davis (Canberra: Australian Government Publishing Service, 1995). The report recommended that the changes not apply to situations involving vicarious liability. See also Austl, Commonwealth, *Inquiry Into the Law of Joint and Several Liability: Report of Stage One* by JLR Davis (Canberra: Australian Government Publishing Service, 1994).

[28] Austl, Victoria, Attorney-General's Law Reform Council, *Report on the Economics of Joint and Several Liability versus Proportionate Liability* (Expert Report 3) by M Richardson (Melbourne, 1998) at v.

[29] NZ, Law Commission, *Apportionment of Civil Liability* (Report No 47, 1998) [New Zealand Report].

[30] New South Wales Law Reform Commission, *Contribution between persons liable for the same damage* (Report No 89, 1999) [New South Wales Report].

[31] Austl, Standing Committee of Attorneys General, *Proportionate Liability Regulation Impact Statement*, September 2011 at 4. For a review of the events, see Andrew Field, "There must be a better way': Personal Injuries Compensation since the 'Crisis in Insurance'" (2008) 13:1 Deakin Law Review 67, online: <http://www.deakin.edu.au/buslaw/law/dlr/docs/vol13-iss1/vol13-1-3.pdf>.

[32] Austl, Commonwealth, *Corporate Disclosure: Strengthening the financial reporting framework* (Corporate Law Economic Reform Program, Policy Paper 9) (Canberra: Australian Government Publishing Service, 2002).

[33] Austl, Commonwealth, *Review of the Law of Negligence: Final Report* (Canberra: Department of Treasury, 2002) at x, online: <http://revofneg.treasury.gov.au/content/review2.asp>.

"firmly of the view that it should make no recommendation to replace joint and several liability with proportionate liability".[34]

The panel explained its view of the justification for joint and several ("solidary") liability:

> The basic justification for solidary liability is that because the wrongful conduct of each of the wrongdoers was a necessary condition of the harm suffered by the plaintiff, it should not be open to any of the wrongdoers to resist - as against the plaintiff - the imposition of liability for the whole of the harm suffered.
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> As regards the person who suffered harm, the argument that solidary liability is unfair can be met by pointing out that the conduct of each of the multiple wrongdoers was a necessary condition of the harm suffered; and in this sense, each of the multiple wrongdoers is fully responsible for it. From the plaintiff's point of view, it would seem very difficult to justify a situation in which a person who was harmed by more than one wrongdoer (only one of whom was solvent and available to be sued) could be worse off than a person who was harmed by only one wrongdoer who was solvent and available to be sued.
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> As between multiple wrongdoers, the possibility of recovering contribution can be seen simply as a piece of good luck. If a wrongdoer negligently causes harm to another, that person is liable for it regardless of the degree of fault their conduct displayed. The fact that the degree of a particular wrongdoer's fault is small does not, by itself, provide a reason for reducing that person's liability to the harmed person. In this light, the fact that a wrongdoer whose fault was slight may be unable to recover contribution from another wrongdoer whose fault was greater, provides no reason to reduce the liability of the former simply because the former was only one of a number of wrongdoers responsible for the same harm. Nor does it result in the plaintiff's loss being distributed by reference to ability to pay, rather than responsibility for the loss. Rather, it is distributed by reference to the principle that a person who negligently causes harm to another must pay for it.
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> When premiums are set, an insurer must necessarily assess the risk on the assumption that the insured will be liable for the full amount of any harm. This is so regardless of whether the law provides for solidary or proportional liability because at the time the premium is set, the insurer must allow for the possibility that the insured will be a sole wrongdoer.[35]

Australian states and territories subsequently carried out a range of tort law and commercial law reforms. All jurisdictions retained the doctrine of joint and several liability for claims in negligence relating to personal injury or death. However, all enacted proportionate liability legislation applying to claims for economic loss or property damage arising from a failure to take reasonable care, and for contravention of statutory provisions prohibiting misleading and deceptive conduct.[36] At the same time, mandatory insurance and licensing

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[34] *Ibid* at para 12.19.

[35] *Ibid* at paras 12.5-12.19.

[36] *Civil Liability Act 2002*, Pt 4 (NSW); *Wrongs Act 1958*, Pt IVAA (Vic); *Civil Liability Act 2002*, Pt 1F (WA); *Civil Liability Act 2003*, Pt 2 (Qld); *Civil Law (Wrongs) Act 2002*, Ch 7A (ACT); *Proportionate Liability Act 2005*

requirements and government home warranty programs were instituted as important elements of the reforms.

In 2007 the Horan Report reviewed the proportionate liability schemes in each jurisdiction with a view to making them more consistent and workable. The report noted that the original rationale for the proportionate liability scheme was the difficulty faced by professionals in obtaining cost effective insurance coverage. Among other recommendations, the report suggested that the scope of the provisions be reduced so that they apply only to those professionals.[37] In 2011, the Standing Committee of Attorneys General issued a consultation draft of model provisions for proportionate liability, with the aim of achieving greater national consistency in the area, addressing concerns about the current potential for forum shopping and for lengthy and costly litigation, and considering options in relation to contracting out.[38]

In the United Kingdom, the Law Commission reported, in a consultation paper released in 1996, that the arguments for proportionate liability were not sufficiently convincing to warrant such reform, and that a full report on the matter was not needed.[39] Joint and several liability generally applies under the *Civil Liability (Contribution) Act 1978*.[40]

In the United States, most jurisdictions made modifications to joint and several liability through legislative reforms during the 1980s and 1990s.[41] According to the American Law Institute *Restatement of the Law Third, Torts: Apportionment of Liability*, the following systems were in place as of 2005, subject to a range of variations:

- joint and several liability;
- joint and several liability unless the plaintiff was contributorily negligent;
- joint and several liability for objectively quantifiable losses (e.g. not including pain and suffering);
- joint and several liability with the reallocation of uncollectable shares among either the tortfeasors only or the tortfeasors and plaintiff if contributorily negligent;
- proportionate liability, subject to various exceptions for claims such as those involving hazardous or toxic substances, pollution, product liability, motor vehicles, impaired driving, tortious interference with contract or gross negligence;
- proportionate liability with the reallocation of uncollectable shares;
- joint and several liability if the defendant's share of fault exceeds a threshold percentage;

(NT); *Civil Liability Act 2002*, Pt 9A (Tas); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*, Pt 3 (SA).

[37] Austl, Standing Committee of Attorneys General, *Proportionate Liability: Towards National Consistency* by Tony Horan (September 2007).

[38] Austl, Standing Committee of Attorneys General, *Consultation Draft: Proportionate Liability Model Provisions*, (September 2011).

[39] UK, Law Commission, *Feasibility Investigation of Joint and Several Liability* (Consultation Paper, 1996).

[40] *Civil Liability (Contribution) Act 1978* (UK), c 47.

[41] American Law Institute, *Restatement of the Law Third: Torts — Apportionment of Liability* (San Francisco, California, 1999) at § 17 cmt a.

- joint and several liability up to a proportional limit (e.g. twice the tortfeasor's proportion of fault);
- joint and several liability for up to a specified percentage of recoverable damages;
- joint and several liability only for economic harm.[42]

Most states retain joint and several liability for intentional tortfeasors and joint tortfeasors (acting in concert).

Restraint must be exercised in following U.S. examples, however, because of the differences in the development of tort law between our countries and the different history and litigation experience. In particular, the use of juries in civil matters in the U.S. and differences in costs consequences in litigation are important distinctions.

B. ALLOCATION OF UNCOLLECTABLE LIABILITY

The Commission has outlined some of the issues surrounding joint and several liability versus proportionate liability, but makes no recommendation for change from the present scheme. Under joint and several liability, the risk of non-recovery from one of multiple tortfeasors lies with the defendants. However, there is an alternative that would allow for a more equitable distribution of this risk among multiple tortfeasors than is currently the case.

Under most Canadian apportionment statutes, if one tortfeasor pays compensation to a plaintiff, that tortfeasor may obtain contribution from other tortfeasors. The share that the other tortfeasors must contribute is limited to their proportion of fault for the damage. The risk that the contribution of one tortfeasor will be uncollectable, because the tortfeasor does not have sufficient assets available for collection or cannot be located, for example, is borne entirely by the tortfeasor who paid the compensation.[43] There is no mechanism for apportioning any shortfall in payment. Subsection 2(2) of the Manitoba Act provides as follows:

> The amount of the contribution recoverable from any person is such as may be found by the court to be just and equitable *having regard to the extent of that person's responsibility for the damage*; and the court may exempt any person from liability to make contribution, or direct that the contribution be recovered from any person amounts to a complete indemnity.[44]

An alternative to this situation is to provide a mechanism by which a tortfeasor who has paid damages to a plaintiff may recover from other tortfeasors their share of the damages plus a share of any amount that cannot be collected from one or more tortfeasors.

The concept of redistributing an uncollectable share among tortfeasors has won widespread support. Law reform bodies in Alberta, Ontario, British Columbia, Saskatchewan and New

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[42] *Ibid.*

[43] Assets may be uncollectable because they are exempt from seizure, are subject to a prior security interest or are subject to claims that have priority under federal or provincial legislation.

[44] *The Tortfeasors and Contributory Negligence Act*, RSM 1987, c T90 [Manitoba Act] [emphasis added].

Zealand[45] have each recommended that the scheme of contribution between tortfeasors be revised so that tortfeasors could reallocate the burden of an insolvent or judgment proof tortfeasor among themselves in proportion to their respective degrees of fault.[46]

This principle is reflected in the 1984 *Uniform Contributory Fault Act*:

> 9. Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, on or after giving judgment for contribution, make an order that it considers necessary to apportion the contribution that cannot be collected among the other concurrent wrongdoers, proportionate to the degrees to which their wrongful acts contributed to the damage.[47]

The definition of 'concurrent wrongdoer' in the Uniform Act does not include a contributorily negligent plaintiff, so that the plaintiff does not share the burden of the uncollectable amount. The former Law Reform Commission of British Columbia felt that the Uniform Act did not go far enough. After recommending that the British Columbia Act be amended to abolish proportionate liability where a plaintiff has been contributorily negligent in favour of joint and several liability, the Commission also recommended that any portion of damages that cannot be collected from a tortfeasor should be distributed among both the other tortfeasors and the contributorily negligent plaintiff. The Commission explained that for a plaintiff not to share in the portion "will be clearly unfair where the plaintiff's degree of contributory fault exceeds the fault of the wrongdoers among whom the shortfall is apportioned. Even where the plaintiff's degree of contributory fault is minimal, he should bear a proportionate share of the shortfall".[48]

This concept was implemented in the Saskatchewan Act by an amendment in 2004:

> 3.1 (2) If the court is satisfied that the contribution of a person found at fault cannot be collected, the court shall, after determining the degree in which each person is at fault, make an order apportioning the contribution that cannot be collected among the other

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[45] Alberta Report, *supra* note 7 at 84-86; Ontario Report, *supra* note 8 at 48; Saskatchewan Report, *supra* note 9 at 19; BC Report *supra* note 15; New Zealand Report, *supra* note 29 at paras 11-12. The Alberta Report noted a similar provision in the *Uniform Comparative Fault Act* of the American National Conference of Commissioners on Uniform State Laws: Alberta Report, *supra* note 7 at 85. The Scottish Law Commission, on the other hand, determined that such a provision was unnecessary since apportionment of a missing wrongdoer's share could be achieved in accordance with its other recommendations on apportionment: Scottish Law Commission, *Report on Civil Liability: Contribution* (Report No 115, 1988) at paras 3.71-3.75.

[46] The UNIDROIT Principles of Commercial Contracts also provide for the reallocation of an uncollectable portion among defendants: International Institute for the Unification of Private Law (UNIDROIT), *Principles of Commercial Contracts* (2010), Article 11.1.13, online: <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.>

[47] Uniform Law Conference of Canada, *Uniform Contributory Fault Act*, s 9, online: <http://www.qp.gov.sk.ca/documents/ULCC/1984ULCC0066.pdf> [Uniform Act].

[48] BC Report, *supra* note 15. The Irish *Civil Liability Act, 1961* takes a different approach. Where a plaintiff is contributorily negligent the liability of the wrongdoers becomes proportionate. If the plaintiff cannot recover all of the judgment, he or she may apply for "secondary judgments having the effect of distributing the deficiency among the other defendants in such proportions as may be just and equitable": s 38.

> persons found at fault, proportionate to the degrees in which they have been respectively found to have been at fault.[49]

Under the Saskatchewan amendment, although joint and several liability is preserved, the risk that a tortfeasor's share of the damages will be uncollectable is shared by the plaintiff if the plaintiff has been contributorily negligent. The amendment was described by the Minister sponsoring the bill as follows:

> Plaintiffs who have contributed to their own loss will be required to share also on a pro rata basis in the effect of any shortfall caused by a defendant who cannot pay its share of the damages. Accordingly where one or more defendants are unable to pay a judgment against them, the plaintiff will receive less in proportion to the liability assessed against them by the court. The law in Saskatchewan is currently the same as all other Canadian jurisdictions, with the exception of British Columbia where plaintiffs found to have contributed to their own loss are not entitled to the benefits of joint and several liability.[50]

The New Zealand Law Commission had initially proposed that a contributorily negligent plaintiff should share in the risk that a defendant's share of the damages may be uncollectable, as in Saskatchewan. However, the Law Commission reconsidered its position:

> Such a proposal, it can be argued, runs completely contrary to the reasons we have advanced in support of solidary liability [joint and several liability]. If the correct view is that D1 is liable to P for all of P's loss, and questions of contribution among defendants are irrelevant to that liability, why should P's net entitlement be diminished because D1 cannot collect the share of P's entitlement that should be contributed by another defendant?[51]

The New Zealand Commission referred to the English case of *Fitzgerald v Lane*,[52] which held that a plaintiff's contributory fault should not be assessed as against each defendant but as all defendants as a unit, since the issue is the plaintiff's departure from appropriate standards. The Commission accepted this approach, and reasoned that it follows that there is then no rationale for allocating a proportion of an uncollectable share to the plaintiff.

In the Commission's view, the Manitoba Act should allow for the uncollectable share of one defendant to be reallocated among other defendants. It will be a question of fact for the court to determine whether a share has become uncollectable, based on the evidence provided by a defendant as to whether he or she has pursued all reasonable avenues of collection.

The Commission agrees with the reasoning of the New Zealand Law Commission, and the similar conclusions reached by the Alberta, Saskatchewan and Ontario law reform bodies. It

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[49] *Contributory Negligence Act*, RSS 1978, c C-31.

[50] Saskatchewan, Legislative Assembly, *Debates and Proceedings*, 25th Leg, 1st Sess, No 40A (May 17, 2004) at 1142-43 (Hon Frank Quennell).

[51] New Zealand Report, *supra* note 29 at para 11. At para 6 the Law Commission explained, in support of the principle of joint and several liability: "Even if, as between D1 and D2, D1 may be only five percent to blame, as between P and D1, D1 is 100 percent to blame."

[52] *Fitzgerald v Lane*, [1989] AC 328.

would be inconsistent with the principles underlying joint and shared liability to reduce a plaintiff's entitlement because one defendant cannot collect from another and to require the plaintiff to engage in additional court proceedings relating to contribution among the defendants. The Act should not require the plaintiff to share the risk that a defendant's share of damages will be uncollectable.

RECOMMENDATION 3

The Act should provide that where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, after determining the degree in which the fault of each concurrent wrongdoer contributed to the damage, make an order apportioning the contribution that cannot be collected among the other concurrent wrongdoers, in proportion to the degrees in which their fault contributed to the damage.

CHAPTER 4

CONTRIBUTORY NEGLIGENCE

> A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.[1]

In *Bradley v Bath*, the British Columbia Court of Appeal approved of the following description by Fleming:

> Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to *others*, but rather failure on the part of the person injured to take reasonable care of himself in his *own* interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the *accident* in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt ... .[2]

The Alberta Court of Appeal summarized the requirements as follows:

> For contributory negligence to succeed as a defence, the defendant must prove that the plaintiff was negligent and that the plaintiff's negligence was a cause of the injuries. In *Wickberg*, the court explained that there are two aspects to causation. First, the negligent actions must be the cause-in-fact of the injuries. Traditionally, the "but-for" test was used, but more recently the material contribution test has been recognized: *Athey v. Leonati*. ... Second, the negligent actions must be a proximate cause of the injuries. The test is reasonable foreseeability of probable or possible risks.[3]

In *Zsoldos v Canadian Pacific Railway Company*, the Ontario Court of Appeal explained that contributory negligence can arise in three ways:

> First, the plaintiff's negligence may have been a cause of the accident in the sense that his acts or omissions contributed to the sequence of events leading to the accident.

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[1] *Jones v Livox Quarries*, [1952] 2 QB 608 (Eng CA), per Denning, LJ, adopted in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210, 158 Nfld & PEIR 269 at para 76. The concept of contributory negligence does not require that the plaintiff owe a duty of care to the defendant, but the standard of care is similar to other negligence cases. The standard is that of a reasonable person acting to protect his or her own safety or property: *Alberta Wheat Pool v Northwest Pile Driving Ltd*, 2000 BCCA 505 at para 21.

[2] *Bradley v Bath*, 2010 BCCA 10, 1 BCLR (5th) 228 at para 25, citing John G Fleming, *The Law of Torts*, 9th ed (Sydney: LBC Information Services, 1998) at 302 [emphasis in original; footnotes omitted]; see also *Enviro West v Copper Mountain Mining Corporation*, 2012 BCCA 23.

[3] *Heller v Martens*, 2002 ABCA 122, 303 AR 84 at para 14 [citations omitted]. The "but for" and "material contribution" tests were clarified by the Supreme Court of Canada in *Clements v Clements*, 2012 SCC 32.

> Second, although the plaintiff's negligence is not a cause of the accident, the plaintiff has put himself in a position of foreseeable harm. Third, as in seatbelt cases, the plaintiff may fail to take precautionary measures in the face of foreseeable danger. See P.H. Osborne, *The Law of Torts*, 3rd ed. (Toronto: Irwin Law, 2007), at pp. 104-5 and Lewis N. Klar, *Tort Law*, 3rd ed. (Toronto: Thomson Carswell, 2003), at p. 457.[4]

These descriptions are consistent with section 4 of *The Tortfeasors and Contributory Negligence Act*, which refers to "negligence … on the part of the plaintiff which contributed to the *damages*".[5]

A. LAST CLEAR CHANCE DOCTRINE

The last clear chance doctrine was developed by the courts to allow a plaintiff who had been contributorily negligent to avoid the harshness of the contributory negligence bar. Rather than being barred from recovery, a negligent plaintiff could recover in full from a defendant if the defendant had the last reasonable opportunity to avoid the accident. However, if the plaintiff had the 'last clear chance', the contributory negligence bar applied and there was no recovery.

> …[W]hen the courts perceived that [the contributory negligence bar] led to unnecessarily harsh results in cases in which the plaintiff was only slightly negligent and the defendant's negligence was comparatively great, a rule was evolved which denied the defense if the defendant's negligence was later, in point of time, than that of the plaintiff. This came to be known as the rule in *Davies v. Mann* [10 M. & W. 546 (1842)], justified as an exception to the Butterfield case on the theory that the plaintiff's negligence was not the proximate cause of the harm. Text writers, and some courts, stressed the time element, and provided an alternative description of the exception to the contributory negligence bar under the name of the last clear chance doctrine. Thus was prevented a clear realization of the underlying reason for the escape from the harshness of the contributory negligence bar, i.e., that in last clear chance cases the defendant's negligence was relatively greater than the plaintiff's.[6]

Since all provinces have enacted legislation to abolish the contributory negligence bar and to provide for the apportionment of fault between defendant and plaintiff, the last clear chance doctrine is no longer relevant in law. However, over the years uncertainty has remained as to whether it continues to exist:

> The doctrine of ultimate negligence has lived long past its indicated demise. It has been attacked repeatedly by scholars and judges, but stubbornly refuses to die.[7]

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[4] *Zsoldos v Canadian Pacific Railway Company*, 2009 ONCA 55, 93 OR (3d) 321at paras 54-56.

[5] *The Tortfeasors and Contributory Negligence Act*, RSM 1987, c T90 [Manitoba Act].

[6] Malcom M MacIntyre, "The Rationale of Last Clear Chance" (1940) 53 Harv L Rev 1225, 18 Can Bar Rev 665 at 665. The rule has also been referred to as the 'clear line' doctrine, based on the 1954 case of *McKee v Malenfant*, [1954] SCR 651; see also *Brooks v Ward*, [1956] SCR 683. In *McKee*, the Supreme Court of Canada held that where a 'clear line' can be drawn between the negligence of the plaintiff and the negligence of the defendant, the plaintiff will be held solely responsible.

[7] Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Toronto: LexisNexis Canada Inc, 2011) at 504.

Professor Klar has argued that the last clear chance rule adds nothing to tort law. Its use in relation to fault is inconsistent with apportionment legislation, and the causation analysis in any matter should be determined according to general tort law principles:

> Despite the fact that a party may be negligent, it is a simple tenet of our system that if this negligence be not proximate to the injuries, due to the unforeseeability of the injuries, the severance of the chain of causation by an intervening cause, or due to policy considerations, this is mere "negligence in the air" and it can be ignored. There is no need, and it in fact confuses the matter, to talk about last-clear-chance in a situation of this nature, which is already amply taken care of by normal concepts. If, on the other hand, a party's negligence is an effective cause of an injury, alongside with a second party's negligence, both have contributed to the injuries and the various statutes call for an apportionment of liability. The fact that one party's negligent act was first or last in the chain of events should be of no consequence, once having determined that the injuries which resulted were within the real risks of that negligence. To speak of "last-clear-chance" or "ultimate negligence" in this context is unnecessary and confusing.[8]

Similarly, Prosser argued for the demise of the rule in 1953:

> The real explanation [for the doctrine] would appear to be nothing more than a dislike for the defense of contributory negligence, and a rebellion against its application in a group of cases where its hardship is most apparent. The last clear chance has been called a "transitional doctrine," a way station on the road to apportionment of damages; but its effect has been to freeze the transition rather than to speed it. Actually the last clear chance cases present one of the worst tangles known to the law.[9]

The last clear chance doctrine has been expressly abolished in Alberta, British Columbia and Prince Edward Island,[10] and under the federal *Marine Liability Act*.[11] The Manitoba, Ontario, New Brunswick and Nova Scotia Acts are silent on the issue. In some jurisdictions, however, apportionment legislation appears to preserve the doctrine of last clear chance. The Saskatchewan, Newfoundland, Yukon, Northwest Territories and Nunavut Acts[12] contain wording that was at one time also found in the Alberta Act and was described by the Alberta Law Reform Institute as appearing "to have been inserted as a compromise short of abolition of the rule".[13] These Acts provide that a judge may not consider or submit as a question to a jury

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[8] Lewis N Klar, Annotation of *McKay v MacLellan* (1976) 1 CCLT 310 at 311-14, 18 NSR (2d) 639.

[9] William L Prosser, "Comparative Negligence" (1953) 41 Cal L Rev 1 at 7.

[10] *Contributory Negligence Act*, RSA 2000, c C-27, s 3.1 [Alberta Act]; *Negligence Act*, RSBC 1996, c 333, s 8 [BC Act]; *Contributory Negligence Act*, RSPEI 1988, c C-21, s 4 [PEI Act].

[11] *Marine Liability Act*, SC 2001, c 6, s 21.

[12] *Contributory Negligence Act*, RSS 1978, c C-31, ss 5-6 [Saskatchewan Act]; *Contributory Negligence Act*, RSNL 1990, c C-33, ss 5-6; *Contributory Negligence Act*, RSY 1986, c 32, s 5; *Contributory Negligence Act*, RSNWT 1988, c C-18, s 6; *Contributory Negligence Act* (Nunavut), RSNWT 1988, c C-18, s 6.

[13] Institute for Law Research and Reform of Alberta, *Concurrent Contributory Negligence and Wrongdoers* (Report No 31, 1979) at 10 [Alberta Report]. This assessment is probably correct. Representatives from BC and Ontario disapproved of the equivalent section (section 5) in the 1934 version of the revised *Uniform Contributory Negligence Act*. In the final 1935 version, section 5 was included as an option for provinces to consider with the explanation that it was "the opinion of the Conference that it correctly enunciates the law as declared in *Admiralty Commissioners v SS Volute* [[1922] AC 129] and *Swadling v Cooper* [[1931] AC 1]": Uniform Law Conference of

any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof *unless* he is satisfied by the evidence, or there is evidence upon which the jury could reasonably find:

> that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous therewith.[14]

This would imply that a judge *may* consider or submit to a jury a question as to whether one of the parties could have avoided the consequences of the other's fault, if the judge is satisfied that the acts are severable.

The Institute for Law Research and Reform of Alberta recommended in 1979 that the equivalent provision in the Alberta Act be repealed and the last clear chance rule clearly abolished.[15] The Alberta Law Reform Institute issued a report repeating this recommendation in 1997,[16] following the Alberta Court of Appeal decision of *Wickberg v Patterson*.[17] In *Wickberg*, the court set out a comprehensive review of the rule and expressed the view that the sections in the Alberta Act added nothing to general tort law:

> [I]t is clear that last clear chance is an anachronism. It is no longer helpful or necessary in the causation analysis.
>
> ...
>
> I cannot read ss. 6 or 7 as attempts by the Legislature to undermine the purpose of the statute, which manifestly is to divide fault among all tortfeasors. The sections should only be invoked in those cases where the distance between accident and alleged fault is so great in time and circumstance that it could be said that the fault is too remote from the injury for liability. But that is a test to be applied in all cases of negligence, so the sections add nothing to the general law. Meanwhile, the duty of a judge is, in every case where the tortfeasor's negligence is not too remote but where another tortfeasor has contributed to the injury, to divide liability.[18]

Appellate courts in British Columbia,[19] Ontario[20] and New Brunswick[21] have held that the last clear chance rule has no further relevance in law. The application of the rule was raised

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Canada, *Uniform Contributory Negligence Act* at 32. These decisions represented early steps by the courts "to qualify and finally substantially to alter the old rule, while keeping up the appearance of continuity": W. Friedmann, "Contributory Negligence: Last Opportunity", Note, (1938) 1:4 Mod L Rev 318 at 318. In these cases, two acts, although not synchronous, occurred so closely together that it was not possible to decide who had the last opportunity.

[14] Saskatchewan Act, *supra* note 12, ss 5-6.

[15] Alberta Report, *supra* note 13. The Ontario Act, like the Manitoba Act, does not include the 'compromise' wording. However, the Ontario Law Reform Commission also recommended in its 1988 report that the rule be expressly abolished: Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 259 [Ontario Report].

[16] Alberta Law Reform Institute, *Last Clear Chance Rule*, (Report No 75, 1997).

[17] *Wickberg v Patterson*, [1997] 4 WWR 591, (1997) 145 DLR (4th) 263. See also *Verth v Howrie*, 1998 ABCA 151.

[18] *Wickberg v Patterson*, *supra* note 17 at paras 30-32.

[19] *Lowe v Insurance Corp of British Columbia*, 2002 BCCA 514; *Lawrence v Prince Rupert (City)*, 2005 BCCA 567; *Dyke v British Columbia Amateur Softball Assn*, 2008 BCCA 3, [2008] 9 WWR 646 at paras 26-28, per Donald, J: "However, I think it is necessary, because the judge felt he was following a current line of authority, to

before the Newfoundland Court of Appeal, in 2004, but the court determined that it was not necessary to decide the issue, given its finding that the plaintiff was not contributorily negligent.[22]

Following the 1997 Alberta Report, Alberta's *Contributory Negligence Act* was amended as follows:

> Last clear chance rule not applicable
>
> 3.1 This Act applies if damage is caused or contributed to by the act or omission of a person, whether or not another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.[23]

The Manitoba Act does not share the 'compromise wording' found in the Alberta Act before its amendment, and the Supreme Court of Canada suggested in 1977, in *obiter*, that the rule does not survive in Manitoba:

> If the so-called last opportunity or last-clear-chance doctrine, said to derive from *Davies v. Mann*, can be said to have survived the passage of the *Contributory Negligence Acts*, as to which I harbour gravest doubt, having regard to the apparent intent of provisions such as contained in s. 4(1) of the Manitoba Act, I do not think the doctrine can have the remotest application on the facts of this case.[24]

The most recent Manitoba Court of Appeal comment on the subject was in 1987, in *Poitras v Goulet*:

> Having reached the conclusion that the plaintiff was not negligent, it is not necessary to consider whether, if he were careless in positioning himself where he did, the last clear chance doctrine would or could apply to the situation, (assuming that the doctrine is still alive in this jurisdiction).[25]

It is certainly arguable that the last clear chance rule no longer exists in Manitoba, and that no legislative provision is necessary to address it. On the other hand, it appears that confusion may still exist regarding the concept, and it is not always argued in explicit terms:

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deal with his last alternative reason for refusing liability: the "clear line" or "last chance" doctrine. I wish to say in the strongest terms that the doctrine is extinct and occupies no place in the law of torts in this jurisdiction. ... Drawing a clear line between the defendant's and plaintiff's negligent acts gives expression to a linear form of thinking and compartmentalizes causes according to the timing of events. What the legislation requires is a lateral analysis that examines the weave of causal factors that brought about the loss. So the appropriate image is of a web, rather than a chain where it is said that the linkage is broken by the plaintiff's own negligence."

[20] *Snushall v Fulsang* (2005), 78 OR (3d) 142 at para 30 (CA), leave to appeal to SCC refused, [2005] SCCA No 519; *Treaty Group v Drake International*, 2007 ONCA 450, 86 OR (3d) 366.

[21] *Fillier v Whittom* (1995), 171 NBR (2d) 92 (CA).

[22] *Giles v Richardson*, 2004 NLCA 8, 233 Nfld & PEIR 229.

[23] Alberta Act, *supra* note 10, s 3.1. The wording of section 8 of the BC Act and section 4 of the PEI Act, *supra* note 10, is similar. The last clear chance rule is also abolished in section 9 of the *Uniform Contributory Fault Act*: Uniform Law Conference of Canada, online: <http://www.qp.govsk.ca/documents/ULCC/1984ULCC0066.pdf> [Uniform Act].

[24] *Hartman v Fisette*, [1977] 1 SCR 248 at 258, 66 DLR (3d) 516.

[25] *Poitras v Goulet*, 1987, 46 Man R (2d) 87 at 90.

> The doctrine of last clear chance can appear in many guises, often couched in the language of causation, or confused with remoteness. But it always fails to recognize that "each component of liability is only a facet of the whole, and judgment must be on the entirety, not piecemeal on refractions from each facet": Abbott v. Kasza (1976), 71 D.L.R. (3d) 581 at 589 (Alta. S.C. App. Div.). ... Courts should not resurrect the last clear chance doctrine, abolished by legislative choice, by masquerading it as an apportionment theory.[26]

In the interests of certainty, the Commission recommends that the new Act clearly abolish the last clear chance doctrine.

RECOMMENDATION 4

The Act should clearly abolish the last clear chance doctrine.

B. SCOPE OF CONTRIBUTORY NEGLIGENCE

Section 4 of the Manitoba Act provides:

> Plaintiff guilty of contributory negligence
> 4. Contributory negligence by a plaintiff is not a bar to the recovery of damages by him and in any action for damages that is founded upon the negligence of the defendant, if negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of negligence found against the plaintiff and defendant respectively.[27]

Most other Canadian contributory negligence provisions refer to 'fault' rather than 'negligence'. The Ontario Act refers to 'fault or negligence'. Manitoba is the only Canadian jurisdiction to use only the term 'negligence'.

The Manitoba Law Reform Commission made an informal report to the Minister of Justice on this point in 1992, pointing out that the wording of the Manitoba Act restricts its application:

> It goes without saying that all of these [apportionment] statutes apply, at a minimum, to negligence actions. The concept of "negligence" is also broad enough to include any other type of tort on those occasions when that tort is committed negligently - for example, a negligently-caused trespass to the person. In Manitoba, this represents the maximum applicability of our statute due to its restrictive wording.[28]

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[26] *Heller v Martens*, *supra* note 3 at para 25.
[27] *The Tortfeasors and Contributory Negligence Act*, RSM 1987, c T90 [Manitoba Act].
[28] Manitoba Law Reform Commission, *Scope of Apportionment Under The Tortfeasors and Contributory Negligence Act* (Informal Report No 22A, 1992) at 2.

The Commission noted that "[r]ecent years have seen a cautiously emerging trend in the case law of other provinces to expand use of apportionment principles beyond the traditional negligence action".[29] In its view, more general terminology would support the fundamental purpose of contributory negligence legislation, to promote fairness:

> In the opinion of the Commission, no compelling policy reason is served by continuation of Manitoba's uniquely restrictive wording. While apportionment statutes were originally conceived for the narrowly-stated and narrowly-understood purpose of overcoming the absolute bar resulting from the common law defence of contributory negligence, it is acknowledged that their modern purpose is to act as a broad mechanism to promote fairness of result between parties. This modern purpose is better reflected by the adoption of more general terminology.[30]

The Commission recommended that the term 'negligence' in the Manitoba Act be replaced with 'fault or negligence'.[31]

The Commission continues to be of the view that the Act should refer to "fault" rather than "negligence", for the reasons outlined in its 1992 informal report.

RECOMMENDATION 5

The Act should refer to a person's "fault" and not to a person's "negligence".

For greater certainty, the Act should also include a definition of the term "fault". The definition of fault in the *Uniform Contributory Fault Act* serves as a useful model in this regard. The *Uniform Act* defines fault as follows:

> "fault" means an action or omission that constitutes
>
> (a) a tort,
> (b) a breach of statutory duty that creates a liability for damages,
> (c) a breach of duty of care arising from a contract that creates a liability for damages, or
> (d) a failure of a person to take reasonable care of his own person, property or economic interest,
>
> whether or not it is intentional.

The Commission recommends that this definition serve as a model for a similar definition in Manitoba's new Act, with necessary adjustments for consistency with the Commission's

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[29] *Ibid* at 2.
[30] *Ibid* at 5-6.
[31] *Ibid* at 6. The Commission observed that the amendment would give Manitoba's judiciary the advantages and flexibility of judges in other provinces and "may obviate any need in the future to expend time and resources developing an extensive statutory approach to the apportionment area": at 6.

recommendations in respect of contributory negligence and vicarious liability, breach of contract, and breach of statutory duty.[32]

RECOMMENDATION 6

The Act should define the term "fault", using the* Uniform Contributory Fault Act *definition as a model with necessary modifications.

1. Torts Other Than Negligence

(a) Intentional Torts

As the Commission suggested in its informal report, 'fault', as it relates to contributory negligence, has been extended beyond traditional negligence in other Canadian jurisdictions. Unlike in Manitoba, contributory negligence may reduce the plaintiff's damages when the defendant's wrongful conduct was intentional, although the courts have varied in their approach.

British Columbia courts have found a range of intentional wrongs to be included within the term 'fault', including assault, slander and fraud.[33] In Saskatchewan, the Court of Appeal held to the contrary in a case dealing with contribution among tortfeasors, in *Chernesky v Armadale Publishers Ltd.*[34] The Court found that the Saskatchewan Act applied only to negligence, so that the common law prohibition against contribution among tortfeasors still applied to an intentional tort. More recently, however, the Saskatchewan Court of Appeal has commented that "[t]here are strong arguments to be made that Chernesky has been overtaken by the development in the law."[35]

Decisions have varied with respect to whether provocation is 'fault', and therefore contributory negligence, in the context of the intentional tort of battery.[36] In Alberta, the Court of Appeal has held that there can be no contributory negligence in relation to the intentional tort of deceit.[37]

In Ontario, the Court of Appeal approved of the following comments of Linden, J.:

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[32] See below, pages 41, 55, 56.

[33] *Logeman v Rossa*, 2006 BCSC 692; *Brown v Cole* (1995), 14 BCLR (3d) 53 (CA) (contributory negligence not found); *Anderson v Stevens* (1981), 29 BCLR 355 (SC) (fault encompasses intentional torts, including fraud).

[34] *Chernesky v Armadale Publishers Ltd* (1974), 53 DLR (3d) 79.

[35] *DB v Parkland School Division No 63*, 2004 SKCA 113, 244 DLR (4th) 629, [2005] 2 WWR 227 at para 16. This case also dealt with contribution among tortfeasors.

[36] Cases holding that provocation is fault include *McCluskey v Metrotown Hotel Inc*, [1994] BCJ No 459 (QL); *Norman v Kipps*, [1994] BCJ 97; *Berntt v Vancouver (City)*, [1997] 4 WWR 505, 28 BCLR (3d) 203 (BCSC) at paras 162-65, reversed on other grounds, 1999 BCCA 345, 174 DLR (4th) 403. Other courts have held to the contrary; e.g.: *Wilson v Bobbie*, 2006 ABQB 22, 392 AR 237.

[37] *Kelemen v El-Homeira*, 1999 ABCA 315, 250 AR 67, leave to appeal to SCC refused, [2000] SCCA No 4015.

> Fault and negligence, as these words are used in the Statute, are not the same thing. Fault certainly includes negligence, but it is much broader than that. Fault incorporates all intentional wrongdoing, as well as other types of substandard conduct.[38]

In *S Maclise Enterprises v Union Securities Ltd*, the Alberta Court of Appeal took a broad view of the interaction between the principle of contributory negligence and the tort of negligent misrepresentation. The Court rejected an 'all or nothing' approach, and its reasoning is helpful in considering an approach to intentional torts. The plaintiff had argued that the trial court's finding of contributory negligence was inconsistent with the finding that its reliance on the defendants' representations was reasonable:

> It obviously appears to be inconsistent for the trial judge to find reliance was reasonable and to also find contributory negligence in relying on that representation. But there are other ways that contributory negligence can arise. In some cases it might be reasonable to rely on the representation, but not to rely only on the representation: *Avco Financial Services* at para. 33.
>
> To give another example, the investment decision might be made based on a number of factors, one of them being the negligent misrepresentation. If "but for" each and any of the factors the investment would not have been made, then it is possible for contributory negligence to arise with respect to some of the other causative factors ... Here the contributory negligence was found to arise in a failure on the part of the appellant to conduct proper due diligence with respect to matters outside the representations. .... The finding of contributory negligence is therefore not inconsistent.
>
> Further, the law now does not favour an all-or-nothing approach to negligence. Under the common law, even the slightest element of contributory negligence would defeat the whole claim. The doctrine of last clear chance was vigorously applied to ameliorate the effects of that rule, but it also led to an all-or-nothing result. Under the *Contributory Negligence Act*, R.S.A. 2000, c. C-27, the law now requires that the relative fault of the parties be measured, and that responsibility be allocated accordingly. Under this balanced approach to contribution, there is room to find that reliance was reasonable, but also that the plaintiff could have done more to prevent the losses, as long as the findings are not truly inconsistent: *Avco Financial Services* at para. 35.[39]

Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd[40] was a rectification action in contract based on the defendant's fraud, but the comments of the Supreme Court of Canada are relevant. The Court noted that as an equitable remedy, the award of rectification is in the discretion of the court and the conduct of the plaintiff is relevant to the exercise of that

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[38] *Bell Canada v Cope (Sarnia) Ltd* (1979), 11 CCLT 170 (Ont SC) at para 26, aff'd (1980), 31 OR (2d) 571 (CA). The Supreme Court of Canada has held that vicarious liability includes an element of fault: *Blackwater v Plint*, [2005] 3 SCR 3, 258 DLR (4th) 275. However, the Court did not resolve the question of whether vicarious liability constitutes 'fault' under the BC *Negligence Act*, because if it did not meet the definition of fault liability could be apportioned on the basis of common law contribution.

[39] *S Maclise Enterprises v Union Securities Ltd*, 2009 ABCA 424 at paras 37-39. See *Avco Financial Services Realty Ltd v Norman* (2003), 64 OR (3d) 239, 226 DLR (4th) 175 (CA).

[40] *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19, [2002] 1 SCR 678.

discretion. However, in *Performance Industries*, the defendant's actions were fraudulent. The Court said:

> It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected. "[F]raud 'unravels everything'": Farah v. Barki, [1955] S.C.R. 107, at p. 115 (Kellock J. quoting Farwell J. in May v. Platt, [1900] 1 Ch. 616, at p. 623).
>
> The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'": Central R. Co. of Venezuela v. Kisch (1867), L.R. 2 H.L. 99, at pp. 120-21. Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd. (1988), 22 B.C.L.R. (2d) 322 (S.C.), where she observed that "[c]arelessness on the part of the victim has never been a defence to an action for fraud" (p. 335).
>
> > Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law. And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue. [p. 336]
>
> ...
>
> To the same effect is Spencer Bower and Turner, The Law of Actionable Misrepresentation (3rd ed. 1974), at p 218:
>
> > A man who has told even an innocent untruth, by which he has induced another to alter his position, - much more one who has fraudulently lied with that object and result, - has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.[41]

These statements are equally applicable to tort cases arising from fraud. Fraud actions are distinct in that they are based on a specific inducement for the plaintiff to rely on the defendant, and the plaintiff should not be penalized for his or her reliance. However, as in *S Maclise*

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[41] *Ibid* at paras 68-70.

Enterprises and *Avco Financial Services*, an all or nothing approach should be rejected. Cases may arise in which apportionment may be appropriate even though the defendant's actions were fraudulent, if the plaintiff's actions, in addition to the fraud, are a cause of the injury. The Ontario Law Reform Commission raised the example of a defendant who fraudulently induces a plaintiff to purchase defective goods, and a plaintiff who unreasonably uses the goods after becoming aware of the fraud and the defect.[42] In such cases, apportionment may be appropriate. Courts may still be relied upon to deny apportionment where the plaintiff's only 'fault' is to have relied on the defendant's fraud.

In *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)*,[43] the House of Lords held that contributory negligence is not a defence to a claim in fraud. However, courts in England are limited by the definition of 'fault' in the United Kingdom Act,[44] which is restricted to negligence, breach of statutory duty or other act or omission *that gives rise at common law to a defence of contributory negligence*. Because there was no common law defence of contributory negligence to the tort of deceit, the principle did not apply under the Act. Lord Hoffman stated, "This appears to me in accordance with the purpose of the Act, which was to relieve plaintiffs whose actions would previously have failed and not to reduce the damages which previously would have been awarded against defendants."[45]

In a 2011 English case, the Court of Appeal arrived at a similar result with respect to the tort of assault and battery, albeit with some reluctance. Aikens, L.J. explained:

> The Co-op is only entitled to assert that Miss Pritchard was "contributorily negligent" so that any damages to which she is entitled must be reduced if, at common law, there was a defence of "contributory negligence" to a claim against a defendant for damages for the torts of assault or battery. There is no case before the 1945 Act which holds that there was such a defence in the case of an "intentional tort" such as assault and battery. There are many pointers indicating that there was no such defence.[46]

Smith, L.J., agreed that this was the correct legal result, with regret:

> Reading those words on their own and giving the word 'fault' its ordinary or colloquial meaning, one might think that a claimant who provoked a defendant to an act of violence against him (either by words or actions) was 'at fault' and that it was Parliament's intention that, if it was held that he had suffered injury as the result partly of his own fault and partly as the defendant's fault, his damages could be reduced to reflect the justice and equity of the case. However, that would be to ignore the definition of fault in the Act and the way that that definition has been construed by the House of Lords.

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[42] Ontario Report, *supra* note 15 at 238.

[43] *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)*, [2003] 1 All ER 173.

[44] *Law Reform (Contributory Negligence) Act 1945* (UK), 8 & 9 Geo VI, c 28, s 4.

[45] *Standard Chartered Bank*, *supra* note 43 at para 12. Similarly, in *United Services Funds (Trustees) v Richardson Greenshields of Canada Ltd* (1988), 22 BCLR (2d) 322 (BCSC) it was held that negligence by the plaintiff is not a defence to fraud. The court limited the meaning of 'fault' to situations where a plaintiff would be precluded from recovering at common law because of contributory negligence.

[46] *Cooperative Group v Pritchard*, [2011] EWCA Civ 329 at para 61.

> I reach this conclusion with regret because I think that apportionment ought to be available to a defendant who has committed the tort of battery where the claimant has, by his misconduct, contributed to the happening of the incident, for example by provocative speech or behaviour. I think that there ought to be some apportionment in the present case. I think that Miss Pritchard's conduct was provocative, verging on the intimidatory. I entirely accept that Mr Wilkinson's conduct was unlawful; it went beyond what he was entitled to do. But I do not think that he intended to harm Miss Pritchard, only to remove her. In all the circumstances, I think it would be just and equitable if her damages were to be reduced by one third. However, I do not think that the law permits me so to hold.[47]

In the Commission's opinion, the law of apportionment for contributory negligence should be allowed to develop beyond its original restricted purpose, which was to remove the contributory negligence bar that existed at common law and to allow plaintiffs to recover damages when their negligence contributed to their injuries. An 'all or nothing' approach should be rejected. Principles of fairness should allow courts to consider the standard of conduct of both parties, and the causal relevance of such conduct, when determining the appropriate apportionment in intentional tort cases.

In cases involving intentional torts such as battery and deceit, the blameworthiness and causal relevance of a defendant's conduct may be significant, and a plaintiff's contribution to the damage may be minimal in comparison. This is a decision that the courts are well able to make on the facts of each case, and the Act should provide them the latitude to do so.

The 1979 report of the Institute of Law Research and Reform of Alberta recommended that the defence of contributory negligence should be available to intentional torts and torts that are crimes as well as those that are framed in negligence, also based on the broader rationale of achieving fairness between plaintiff and defendant. Based on that rationale, the defence should not be restricted to certain categories of torts.[48] The Ontario Law Reform Commission report agreed with this recommendation,[49] as does the Commission.

RECOMMENDATION 7

The Act should provide for apportionment of damages for contributory fault in respect of intentional torts and torts that are crimes as well as those that are framed in negligence.

(b) Strict Liability Torts

The Alberta and Ontario reports did not discuss whether apportionment should be available for contributory negligence in the case of a strict liability tort. Several courts have held that apportionment is not available for the strict liability tort of conversion, citing the Supreme

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[47] *Ibid* at para 82.
[48] Alberta Report, *supra* note 13 at 11-15.
[49] Ontario Report, *supra* note 15 at 275.

Court of Canada decision in *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*.[50] In Australia, the New South Wales Court of Appeal noted in the landmark apportionment case of *Barisic v Devenport* that "[w]here the defendant's liability is strict, and he has not in fact been negligent, there is no common standard by which the responsibilities of the plaintiff and defendant can be compared…".[51] Professor Osborne has observed that "the drafters of [apportionment] legislation do not appear to have intended that it apply to strict liability".[52] Others hold the view, however, that there is "a growing feeling that there should be apportionment in strict liability cases".[53]

In *Cowles v Balac*, a case dealing with strict liability for injuries caused by dangerous animals, Borins J.A., of the Ontario Court of Appeal, in dissent, distinguished *Boma*:

> In my respectful view, in stating contributory negligence is not available in the context of a strict liability tort, Iacobucci J. was not intending to state a general principle. Rather, he was referring to the law of bills of exchange in respect to which Parliament has legislated in the *Bills of Exchange Act*, R.S.C. 1985, c. B-4.[54]

Borins J.A. felt that the principles of contributory negligence and strict liability were not inherently contradictory:

> In my view, the application of a principle akin to comparative negligence to strict liability would not defeat or frustrate the rationale that led to the development of the principle of strict liability. Plaintiffs will continue to be relieved of proof of a defendant's negligence. The defendant's liability for keeping a dangerous animal will remain strict. A plaintiff's recovery will be reduced only to the extent that his or her lack of reasonable care contributed to the cause of his or her injuries. In a case where the evidence demonstrates that the [plaintiff's] "own act" was the sole cause of his or her damages, although the defendant remains strictly liable for the damages, the plaintiff will obtain no recovery.
>
> Although it may appear to be doctrinally counterintuitive to apply comparative negligence principles where a defendant's liability is strict and not [dependent] on negligence, in my view functional and fairness considerations strongly suggest that comparative negligence principles are appropriate where a plaintiff's misconduct or want of care is a contributing factor to his or her damages. Of course, each case will depend on its own facts. While it may be said that a defendant's liability should not be diluted when a loss occurs that strict liability is intended to prevent, there will be cases where a plaintiff's misconduct is so clearly a contributory factor, or the contributory

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[50] [1996] 3 SCR 727, 140 DLR (4th) 463. Iacobucci, J said "[i]t seems as a matter of principle that contributory negligence would not be available in the context of a strict liability tort" at para 35. See for example, *Nesbitt Burns v Canada Trustco Mortgage*, [2000] OJ No 868, 131 OAC 85; *GE Capital Canada v Bank of Montreal*, 2003 BCSC 1180, 17 BCLR (4th) 304.

[51] *Barisic v Devenport*, [1978] 2 NSWLR 111 at 141, citing Douglas Payne, "Reduction of Damages for Contributory Negligence" (1955) 18: 4 Mod L Rev 344 at 347.

[52] Because the legislation applies to situations where the defendant is negligent or at fault: Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 351.

[53] Linden & Feldthusen, *supra* note 7 at 558.

[54] *Cowles v Balac* (2006), 83 OR (3d) 660, 273 DLR (4th) 596 at para 216; leave to appeal to SCC refused, 2006 SCCA No 496. The majority did not find it necessary to decide whether the defence of contributory negligence applies to a finding of strict liability because the trial judge did not find contributory negligence on the facts.

> factor, that it will seem, to many, to be more unfair to ignore it than to consider it. This would favour the application of comparative negligence principles for a plaintiff's failure to exercise reasonable care in relation to dangerous animals, and to reduce the plaintiff's damages accordingly.[55]

The Commission agrees with this reasoning, and recommends that apportionment should be available for contributory negligence in respect of strict liability torts.

The application of contributory fault principles to strict liability torts is problematic if apportionment is based solely on the comparative blameworthiness of the parties. Strict liability torts contemplate that, in some circumstances, a defendant may be found liable without being in any degree at fault. In some cases of strict liability, it might be difficult to assign blame to either party, in the sense of a departure from expected standards of behaviour. In this regard, the Commission reiterates its view, as expressed in Recommendation 2, that apportionment ought to be based on considerations of both relative blameworthiness and the causal relevance of the parties' conduct.

RECOMMENDATION 8

The Act should provide for apportionment of damages for contributory fault in respect of strict liability torts.

(c) Vicarious Liability

In *GE Capital Canada v Bank of Montreal*, an application by the plaintiff to strike portions of the statement of defence and a third party notice, the court observed:

> The law is unclear with respect to whether a plea of contributory fault relying on ... vicarious liability ... is available as a defence to the claim of knowing assistance of breach of fiduciary duty.[56]

On general principle, it would seem that the contributory negligence of a plaintiff would include acts and omissions of those for whom the plaintiff is vicariously liable - for example, the plaintiff's employees and agents. The Supreme Court of Canada has commented that vicarious liability implies fault in the sense that it is imposed not randomly but on a person in a position to have supervised and prevented the harm, and that parties may be more or less vicariously liable.[57] In some Australian jurisdictions, apportionment legislation specifically deals with this point with respect to the *defendant's* acts or omissions and contribution. The Northern Territory *Law Reform (Miscellaneous Provisions) Act* provides, with respect to Part V - Contributory Negligence:

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[55] *Ibid* at paras 217-218.

[56] *GE Capital Canada v Bank of Montreal*, 2003 BCSC 1180 at para 41.

[57] *Blackwater v Plint*, 2005 SCC 58. See also *British Columbia (Attorney General) v Insurance Corporation of British Columbia*, 2008 SCC 3, [2008] 1 SCR 21, regarding vicarious liability under the *Police Act*, RSBC 1996, c 367, s 11.

> A reference in this Part to the wrong of a person shall be deemed to include a reference to a wrong for which that person is vicariously responsible.[58]

The Irish *Civil Liability Act, 1961* deals expressly with vicarious liability and contributory negligence:

> 35. (1) For the purpose of determining contributory negligence –
>
> (a) a plaintiff shall be responsible for the acts of a person for whom he is, in the particular circumstances, vicariously responsible.[59]

The Commission recommends that the Act also be clear on this point.

RECOMMENDATION 9

The contributory fault of a person under the Act should include fault for which the person is vicariously responsible.

2. Breach of Fiduciary Duty

The Institute of Law Research and Reform of Alberta and the Ontario Law Reform Commission each declined to recommend that principles of contributory negligence be extended by statute to breaches of fiduciary duty. The Alberta Institute concluded that principles of contribution among tortfeasors should apply to breaches of trust, but not the principle of contributory negligence.[60] The Ontario Commission felt that, given that the law in the area was fluid and developing, more time was needed to examine more fully whether application of the principle was appropriate, and "the issue ... should be left to be determined by the courts on a case-by-case basis".[61]

The law of fiduciary duty has continued to develop since the release of the Alberta and Ontario reports. In *United Services Funds (Trustees of) v Richardson Greenshields of Canada Ltd*,[62] Southin, J. concluded that the contributory negligence statutes were specifically intended to ameliorate the effects of the common law defences, and not to create a new defence of contributory negligence. If the common law did not recognize contributory negligence as applicable in a type of action, the legislation did not alter this. As a result, contributory negligence did not apply in an action for fraud or breach of fiduciary duty.

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[58] *Law Reform (Miscellaneous Provisions) Act* (NT), s 15(2).
[59] *Civil Liability Act, 1961* (Ireland).
[60] Alberta Report, *supra* note 13 at 52.
[61] Ontario Report, *supra* note 15 at 251.
[62] *United Services Funds (Trustees of) v Richardson Greenshields of Canada Ltd* (1988), 48 DLR (4th) 98; 22 BCLR (2d) 322 (BCSC).

In Manitoba, the Court of Appeal has held that contributory negligence under the Manitoba Act cannot be a factor in an action for breach of fiduciary duty, because of the Act's restrictive wording.[63]

In *Day v Mead*, the New Zealand Court of Appeal upheld the trial court's reduction of the amount awarded to the plaintiff on the basis of contributory negligence. The President of the Court said:

> Whether or not there are reported cases in which compensation for breach of fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims. Moreover, assuming that the Act does not itself apply, it is nevertheless helpful as an analogy, on the principle to which we in New Zealand are increasingly giving weight that the evolution of judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and by other current trends.[64]

In *Canson Enterprises Ltd v Boughton & Co*, La Forest, J. agreed with the reasoning of the New Zealand court:

> Like the trial judge, [the court] concluded that it was proper to apportion the loss. In its view, not only was this justifiable on the basis of equitable principles, but law and equity had become so merged in this area that the principles of contribution should apply. As well, judge-made law was quite properly affected by legislative action, there the *Contributory Negligence Act*, and by other current trends.[65]

Justice La Forest's comments with respect to the fusion of law and equity were not supported in the minority judgments. However, McLachlin, J. agreed that the conduct of the plaintiff was relevant in an action for breach of fiduciary duty:

> The thrust of these *dicta* is that while the plaintiff will not be required to act in as reasonable and prudent a manner as might be required in negligence or contract, losses stemming from the plaintiff's unreasonable actions will be barred. This is also sound policy in the law of fiduciary duty. ...
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> ...
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> It may not be fair, for example, to allow a plaintiff who has discovered the breach to speculate at the expense of the fiduciary. If a fiduciary holds out an investment as secure when in reality it is highly speculative, the injured party should not be able to retain the investment in unreasonable hope of a fortuitous rise in value, secure in the knowledge that any loss will be borne by the fiduciary. In such a case, the court might

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[63] *Vita Health Co (1985) Ltd v Toronto-Dominion Bank* (1994), 118 DLR (4th) 289, 95 Man R (2d) 255 (CA); leave to appeal to SCC refused, [1994] SCCA No 457.

[64] *Day v Mead*, [1987] 2 NZLR 443 (CA) at 451 per Cooke, P. Somers, J came to the same result, on the basis that "...it would be unjust and unfair to impose total liability on Mr Mead", at 462.

[65] *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 584; 85 DLR (4th) 129.

conclude that the loss should be assessed as at the time at which the behaviour of the plaintiff becomes clearly unreasonable. ...

...

The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach.[66]

In *Hodgkinson v Simms*, La Forest, J., for the majority, elaborated on *Canson*:

Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*; see also *M.(K.) v. M.(H.)*, *supra*, at p. 61. Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. As I stated in *Canson*, at p. 581:

> ... barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.

In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.[67]

The Ontario Court of Appeal adopted the following analysis of the authorities:

Regardless of the doctrinal underpinning, plaintiffs should not be able to recover higher damage awards merely because their claim is characterized as breach of fiduciary duty, as opposed to breach of contract or tort. The objective of the expansion of the concept of fiduciary relationship was not to provide plaintiffs with the means to exact higher damages than were already available to them under contract or tort law.[68]

On the other hand, apportionment for contributory negligence in respect of breach of fiduciary duty has not been accepted in Australia.[69] In the United Kingdom, apportionment

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[66] *Ibid* at 553, 555-6. Similarly, Stevenson, J, in dissent, referred to the decision in *Carl B Potter Ltd v Mercantile Bank of Canada*, [1980] 2 SCR 343, in which the Court held that contributory negligence legislation does not apply in a claim for breach of trust, because there was "no authority for the proposition that a *cestui que trust* owes a duty to its trustee to ensure that the terms of the trust are observed": at 352. A court of equity might find some losses to be caused by the plaintiff, and therefore to be too removed.

[67] *Hodgkinson v Simms*, [1994] 3 SCR 377 at 444, 117 DLR (4th) 161.

[68] *Martin v Goldfarb* (1998), 41 OR (3d) 161, 163 DLR (4th) 639 (CA) at para 34, adopting the reasoning of Lederman, J at the trial level (31 BLR (2d) 265); leave to appeal to SCC refused, [1998] SCCA No 516. See also *Laxey Partners Ltd v Strategic Energy Management Corp*, 2011 ONSC 6348.

[69] *Pilmer v The Duke Group Ltd (in liquidation)* (2001) 207 CLR 165 (HCA); *Astley v Austrust Ltd* (1999) 197 CLR 1. Apportionment for contributory negligence also does not apply to claims for misleading and deceptive conduct

legislation applies in cases of breach of fiduciary duty in relation to contribution among tortfeasors, but not with respect to contributory negligence.[70]

In the Commission's opinion, it is consistent with principles of fairness to take the fault of the plaintiff into consideration as a relevant factor in appropriate cases of breach of fiduciary duty. However, the courts' equitable jurisdiction currently provides the flexibility to achieve justice and fairness in all of the circumstances, and the Commission does not recommend statutory intervention. Equitable doctrines are being applied satisfactorily by the courts, and should be allowed to continue to develop.

As stated by the Ontario Court of Appeal, "[t]he remedies for breach of fiduciary duty are discretionary, dependent on all the facts before the court, and designed to address not only fairness between the parties, but also the public concern about the maintenance of the integrity of fiduciary relationships".[71] Courts will continue to apply these principles.

RECOMMENDATION 10

The Act should not provide for apportionment of damages for contributory fault in respect of breaches of fiduciary duty. The Commission refrains from recommending statutory intervention with the intent that equitable principles in this area will continue to evolve.

In its submissions to the Commission responding to the Consultation Paper, the Canadian Medical Protective Association [CMPA] expressed concern about Recommendation 10.[72] It suggested that legislative silence on the question of contributory fault in respect of breaches of fiduciary duty might act as a barrier to the appropriate apportionment of damages in such cases. A related concern is that the Manitoba Court of Appeal's decision in *Vita Health Co (1985)*[73] will continue to govern these types of cases unless specifically overturned by legislation.

The court in *Vita Health* remarked that principles of contributory negligence were not a factor in cases of breach of fiduciary duty because Manitoba's Act provides for apportionment only in actions founded on a defendant's negligence. In Recommendation 5, above, the Commission recommends that the Act be broadened to refer to a party's fault, rather than negligence. The implementation of Recommendation 5 should at least partially address CMPA's concern.

In advancing Recommendation 10, the Commission is not suggesting that a plaintiff's conduct is never relevant in cases of breach of fiduciary duty. It recognizes that the courts are continuing to apply equitable principles in this area, and that the law will continue to evolve.

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under the *Trade Practices Act*: *I & L Securities Pt Ltd v HTW Valuers (Brisbane) Pty Ltd*, [2002] HCA 41. Callinan, J suggested that the legislature urgently consider amending the *Trade Practices Act* on this point.

[70] Under the *Civil Liability (Contribution) Act 1978* (UK), c 47, s 6(1), apportionment is available whether the basis of liability is "tort, breach of contract, breach of trust or otherwise". Under the *Law Reform (Contributory Negligence) Act 1945* (UK), *supra* note 44, s 4, the definition of 'fault' does not include breach of trust.

[71] *McBride Metal Fabricating v H & W Sales Company* (2002), 59 OR (3d) 97 (CA) at para 30.

[72] Letter from the Canadian Medical Protective Association (May 22, 2013).

[73] *Supra* note 63.

To avoid any uncertainty in this regard, the Commission recommends that the Act include a provision clarifying that nothing in the Act should be interpreted as affecting a remedy that is available in equity.

RECOMMENDATION 11

The Act should include a provision clarifying that nothing in the Act should be interpreted as affecting a remedy that is available in equity.

3. Breach of Contract

The Institute of Law Research and Reform of Alberta recommended that the principle of contributory negligence be extended to cases in which the wrong is a breach of a duty of care imposed by contract. The Institute reasoned that, in many cases, a contractual relationship also exists between a plaintiff and defendant in a tort claim, and a contributorily negligent plaintiff should not be able to avoid having damages reduced in accordance with his or her relative degree of fault simply by framing the action in contract.[74] The Ontario Law Reform Commission agreed with this recommendation in its 1988 report.[75] The Institute's recommendation was included in the 1984 *Uniform Contributory Fault Act*.[76]

In 1990, the Manitoba Court of Appeal agreed that apportionment should apply with respect to a breach of a duty of care founded in contract:

> In my view, however, when the liability of the defendant is founded upon his breach of a duty of care, as in this case, the plaintiff's contributory negligence is a factor to be taken into account whether the duty arises in tort or in contract. Where a breach of contract is also a tort, the disparate consequences of the plaintiff's own contribution to his loss, depending on whether his claim is pleaded in contract or in tort, point out the unreasonableness of any other conclusion. I find support for this view in the comments of Saunders J. in *Tompkins Hardware Ltd. v. North Western Flying Services Ltd.* (1982), 22 C.C.L.T. 1, 139 D.L.R. (3d) 329 at 338-41 (Ont. H.C.).[77]

Six years later, the Court canvassed a related contract issue, in *Caners v Eli Lilly Canada Inc*.[78] Lyon, J.A. observed that while there had been a trend in other provinces toward applying apportionment legislation in contract cases, that approach is not available in Manitoba, since the Manitoba Act is unique in speaking only of negligence, rather than fault or 'fault or negligence'.

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[74] Alberta Report, *supra* note 13 at 15-25.
[75] Ontario Report, *supra* note 15 at 248-49.
[76] Uniform Act, *supra* note 23, s 1.
[77] *Fuerst v St Adolphe Co-Op Parc Inc*, [1990] 3 WWR 466, 63 Man R (2d) 66 at para 25, leave to appeal to SCC refused, [1990] SCCA No 226. See also *Hawman v Regina Exhibition Association Ltd*, 1999 SKQB 123, [2000] 2 WWR 669.
[78] *Caners v Eli Lilly Canada Inc* [1996] 5 WWR 381, 134 DLR (4th) 730. The Court did not refer to *Fuerst v St Adolphe Co-Op Parc Inc*, *supra* note 77.

The court then found that apportionment was also unavailable at common law for an action based on a breach of warranty, where no concurrent action was available in tort:

> The scope of Manitoba's statute was referred to by the Manitoba Law Reform Commission (MLRC) in its report: Re: Scope of Apportionment under The Tortfeasors and Contributory Negligence Act (Report #22A, 1992) found in the Commission's 22nd Annual Report (1992/93).
>
> ...
>
> The MLRC summarized the state of the law as follows:
>
> > There is increasing acceptance by Canadian courts of the proposition that damages in contract can be apportioned at common law, quite apart from statute. Relying on the principle of causation and by simple analogy to statutory apportionment in tort, the extent or measure of apportionment is held to be each party's relative degree of fault. This approach works especially well in concurrent liability situations to avoid the anomaly of having statutory apportionment available in tort but not in contract. ... There does not however appear to be any authority which suggests that apportionment would be appropriate in a case such as this. In the case at bar the issue arises as a warranty collateral to the main contract of purchase and sale.[79]

Courts in other provinces have found the arguments in favour of apportionment for contributory negligence in contract cases, at least where concurrent liability lies in tort, to be persuasive. The Courts of Appeal in New Brunswick and Ontario have held that although the apportionment statutes in those provinces do not apply to apportion liability in actions for breach of contract,[80] fault may be apportioned at common law. In New Brunswick, La Forest, J.A. said, in *Doiron v Caisse Populaire D'Inkerman Ltee*:

> Contribution is now consistent with prevailing theories of both the law and the market-place. And it meets our sense of fairness. In many situations, the fairest approach is to apply the now ordinary rules of contributory negligence. As in torts, the application of the principle of contributory negligence in contract will depend on all the circumstances.[81]

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[79] *Ibid* at paras 25-27.

[80] *Dominion Chain Co Ltd v Eastern Construction Co Ltd* (1976), 12 OR (2d) 201 (CA); aff'd *Giffels Associates Ltd v Eastern Construction Co*, [1978] 2 SCR 1346, 84 DLR (3d) 344. In *Giffels*, Laskin, CJ said, at 1354 (SCR): "In my opinion, it is not necessary in this case to come to a final determination on whether s. 2(1) of *The Negligence Act* is broad enough to embrace contractual liability when other provisions of the Act, like ss. 3 and 9, clearly do not. I incline, however, to the view advanced by counsel for the respondent in this respect. I think it difficult to see how a contract basis for contribution can be read into one provision of a statute which has interrelated provisions dominated by a reference to tortfeasors."

[81] (1985), 61 NBR (2d) 123 at 157-158. The action was framed in contract and in tort. See also *Coopers v Lybrand v HE Kane Agencies Ltd* (1985), 62 NBR (2d) 1 (NBCA); *Finance America v Speed & Speed* (1979), 38 NSR (2d) 374 (CA). In *Smith v McInnis*, [1978] 2 SCR 1357, Pigeon, J in a dissenting judgment (Beetz, J concurring) at 1380-81 suggested that apportionment of liability based on contributory negligence has always been available in contract cases at common law. Pigeon, J suggested that the basis for the common law doctrine of contributory negligence was that a negligent plaintiff was in the situation of a joint tortfeasor, who at common law had no recourse against another joint tortfeasor. Because there never was a rule at common law that one person liable in contract could not

In Ontario, courts have adopted the principle that "where a man is part author of his own injury he cannot call upon the other party to compensate him in full"[82] and have concluded that the apportionment should be the same whether in contract or tort. The British Columbia Court of Appeal has also been open to the concept, although in *Crown West Steel Fabricators v Capri Insurance Services Ltd*,[83] the court applied the *Negligence Act* rather than common law principles. Newbury, J.A., concurring in the result, would have instead extended the concept of contributory fault at common law "as a logical consequence of the growth of concurrency between contract and negligence".[84]

Similarly, Southin, J.A., in the earlier case of *Seaboard Life Insurance v Bank of Montreal*, preferred the extension of the common law:

> ... I consider it wrong to twist a statute of the Legislature to fill a gap in the common law. If a gap requires to be filled, the court should do so in a forthright manner.
>
> Since the common law was able to develop, and indeed overdevelop some might say, a doctrine of contributory negligence in cases of tort, I see no reason why it should not develop an analogous doctrine for the law of contract.[85]

Legal development in the United Kingdom has been shaped by the wording of the United Kingdom Act. As noted above, the *Law Reform (Contributory Negligence) Act, 1945* defines 'fault' to mean "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence".[86]

The English Court of Appeal has held that this definition applies to actions founded in contract where there is a concurrent liability in negligence.[87] It does not apply where the liability arises from a strictly contractual obligation that does not depend on negligence, even if the breach might also constitute negligence,[88] or to a case where the liability arose from a contractual obligation expressed in terms similar to a duty to take care that does not correspond to a common law duty that would exist independently of the contract.

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claim contribution from another, the common law rationale for the contributory negligence bar did not apply to contracts, and apportionment based on contributory negligence was available. The majority did not address this issue.

[82] *Tompkins Hardware Ltd v North Western Flying Services Ltd* (1982), 139 DLR (3d) 329 (Ont HCJ) per Saunders, J at 340. See also *Ribic v Weinstein* (1982), 140 DLR (3d) 258 (Ont HCJ) aff'd (1984), 47 OR (2d) 126 (CA); *Treaty Group (cob Leather Treaty) v Drake International*, [2005] OJ No 5232, 15 BLR (4th) 83 (Ont SC), aff'd 2007 ONCA 450, (2007), 86 OR (3d) 366. In these cases concurrent actions were available in contract and in tort.

[83] *Crown West Steel Fabricators v Capri Insurance Services Ltd*, 2002 BCCA 417, 214 DLR (4th) 577; [2002] 8 WWR 18; 2 BCLR (4th) 272 (concurrent liability in contract and tort).

[84] *Ibid* at para 34. Concurrent claims were available in contract and tort.

[85] *Seaboard Life Insurance v Bank of Montreal*, 2002 BCCA 192, 23 BLR (3d) 163 at para 124 (dissenting); the majority found it unnecessary to decide the question of whether contributory fault should apply to contracts that import a duty of care.

[86] *Supra* note 44, s 4.

[87] *Forsikringsaktieselkapet Vesta v Butcher*, [1988] 2 All ER 43 (CA).

[88] *Barclays Bank v Fairclough Building*, [1994] EWCA Civ 3, [1994] 3 WLR 1057.

In Australia, the High Court held in *Astley v Austrust Ltd*[89] that the application of apportionment for contributory negligence to claims in contract was contrary to the text, history and purpose of the South Australia Act,[90] and that the term 'fault' did not include rights and obligations arising from a breach of contract. A defendant who wishes to limit its liability in situations where the plaintiff's conduct contributes to the damage should contract to achieve that result. Following this decision, all Australian jurisdictions introduced legislation based on model amending provisions released by the Standing Committee of Attorneys General. The New South Wales Act, for example, was amended to extend the apportionment provisions to an act or omission that "amounts to a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort".[91]

The Commission supports the developments in Canadian law described above, and recommends that apportionment should be extended to contributory negligence in actions founded in contract. The question then arises as to how this extension should be framed. Other law reform bodies have been of the view that the contributory negligence principle should not be extended to all breaches of contract that create a liability for damages. The Alberta Institute, for example, recommended that there should be apportionment of liability only where the contract imposes a duty of care and the action is based on a breach of that duty. The Institute conceded that there would be difficulties with this approach:

> If, for instance, a contractor does not utilize a particular grade of steel, this might be either a breach of the term of the contract or a breach of a duty of care. Assuming the plaintiff was contributorily negligent, there will be difficulty in determining whether his damages should be reduced. However, if the defendant is in breach of a contractual duty of care and the plaintiff has been contributorily negligent, we believe that fairness between the plaintiff and the defendant makes apportionment of the damage on the basis of the relative degree of fault necessary. The partial defence of contributory negligence should be available to a defendant even in an action on the contract provided the contract imparts a duty to take care and does not impose an absolute duty.[92]

The Law Reform Commission of British Columbia similarly recommended, based on the *Uniform Contributory Fault Act*, that contributory negligence extend only to a breach of duty of care arising from a contract that creates a liability for damages, although with little discussion of the rationale. The Commission noted that whether contributory fault should apply in all contractual contexts was a 'contentious issue', but adopted the position of the Uniform Law Conference of Canada that contributory fault concepts in contract were dealt with by common law doctrines and a broader statutory provision would have an unsatisfactory impact on the common law.[93]

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[89] *Astley v Austrust* Ltd, [1999] HCA 6.

[90] *Wrongs Act 1936* (SA).

[91] *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 8.

[92] Alberta Report, *supra* note 13 at 25.

[93] Law Reform Commission of British Columbia, *Report on Shared Liability* (Report No 88, 1986) at 33 [BC Report]. See Uniform Law Conference of Canada, *Proceedings of the Sixty-Fourth Annual Meeting* (August 1982) at 118-165, online: <http://66.51.165.111/en/poam2/65th%20Annual%20Meeting.pdf>.

The Ontario Law Reform Commission agreed that the strongest case for apportionment is one where there is a breach of a contractual duty of care, so that concurrent liability is founded in contract and tort, and that anomalies would arise if apportionment were permitted in one form of action and not the other. In determining whether the legislation should be broader than this, the Commission reasoned:

> There is a strong argument for including all breaches of contract in the legislation and leaving it to the courts to exclude apportionment in the appropriate cases. Further, there is the danger of inhibiting the development of the power of apportionment at common law ... On the other hand, the inclusion of all contracts may attract criticism along the lines discussed above, and it may seem a weak response to say, with respect to legislation on its face positively requiring apportionment, that the courts can be expected not to apportion in improper cases.[94]

In outlining possible criticisms, the Ontario Commission raised the example of a defendant who terminated a contract on the basis that the plaintiff's payment was a few hours late, in order to make a larger profit with another customer. Currently, if a court determines that the termination was wrongful, the defendant would have to pay compensation to the plaintiff. The Ontario Commission felt that a party's incentive to repudiate his obligation would be greater if apportionment were available and a possibility existed that he would not have to pay full compensation to the plaintiff. (Of course, the opposite is also true; where apportionment is not available, the terminating party may expect that a court would find that the termination was justified, so that no compensation is payable.) Similarly, in cases where specific performance is available, the Commission felt that it would be anomalous to have a rule of damage assessment that differed in economic effect from full satisfaction of the contract:[95]

> These problems might be met with the argument that the courts would not be compelled in practice to apportion damages, even if the statute were extended to cover all breaches of contract. On the other hand, in view of the limited scope of the Canadian Uniform Act and the hesitation exhibited by law reform bodies in other jurisdictions, it would seem somewhat rash to recommend extension of apportionment to all breaches of contract unless there is a very strong case for such a reform.[96]

The Ontario Commission recommended a provision making apportionment available in the case of a breach of a duty of care arising from a contract that creates a liability for damages. To this category, the Commission added cases in which a breach of warranty by the supplier of a product causes property damage. The Commission felt that in cases where a plaintiff's property damage is caused partly by a breach of warranty and partly by careless use of the product,[97]

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[94] Ontario Report, *supra* note 15 at 248.

[95] Note, however, that a plaintiff would be wise to mitigate his or her damages in any event, unless very confident that the claim for specific performance will be successful: *Southcott Estates v Toronto Catholic District School Board*, 2012 SCC 51.

[96] Ontario Report, *supra* note 15 at 244-45.

[97] The example is the English case of *Lexmead (Basingstoke) Ltd v Lewis*, [1982] AC 225, [1981] 2 WLR 713 (HL): the defendant supplied a defective trailer hitch, in breach of warranty, and the buyer carelessly used the hitch while knowing it to be damaged. Professor Porat suggests that breach of implied warranty is perceived to be on the borderline of torts and contracts, citing American cases that have considered contributory negligence when the contractual liability relates to bodily injury or property damage from a breach of implied warranty. Some US cases have also held that such apportionment may apply when liability arises from any consequential loss: Ariel Porat, "A

apportionment would be appropriate. The Commission then reasoned that there seemed to be no good reason to exclude apportionment in the case of *any* breach of contract that causes property damage or personal injury.

The Ontario Commission appeared to distinguish breaches causing personal injury or property damage from those causing economic loss on the basis that the former "are not the types of case ... in which the contract breaker profits at the expense of the innocent party".[98] However, this is not necessarily the case: a party who breaches a warranty by supplying a product that is defective because cheap, poor quality components or processes were used does profit at the expense of the innocent party. As a result, this Commission finds the distinction difficult to maintain.

The Ontario Commission made the additional recommendations that apportionment for loss caused by breach of contract should be subject to any agreement between the parties, express or implied. As well, in view of its decision not to recommend that apportionment apply in respect of all contracts, and to allow the common law to continue to develop in this area, it recommended a provision that nothing in the Act shall be construed to remove any power of apportionment the courts have apart from statute.[99]

In a 1993 study of this issue, the United Kingdom Law Commission originally inclined to the view that apportionment should be available for all breaches of contract, including a breach of a strict contractual duty. After consultations, the Commission reversed its approach, accepting that such apportionment "would be wrong in principle and would cause difficulties in practice".[100] The Commission recommended that apportionment should be available only for contributory negligence where the defendant is in breach of a contractual duty of reasonable care, irrespective of whether he is concurrently in breach of a tortious duty of care.

Most respondents to the United Kingdom Law Commission in fact supported a general rule that apportionment for contributory negligence should apply to *all* contractual relationships. However, there were also some objections to the suggestion that it apply to breaches of strict contractual obligations. The Commission found many of these to be unconvincing, but was persuaded that the potential increase in uncertainty in the law was a concern, and that "issues as to the quality of the defendant's conduct and the appropriate reduction in damages would result in greater overall uncertainty to an extent that would be undesirable".[101] The Commission also found merit in the argument that apportionment could have undesirable consequences for a plaintiff where the defendant is the financially stronger party, since the defendant would have

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Comparative Fault Defense in Contract Law" (2008) Tel Aviv University Law School Papers, Paper 88; Ariel Porat, "Contributory Negligence in Contract Law: Toward a Principled Approach" (1994) 28 UBCL Rev 141 at 143, notes 15 and 16.

[98] Ontario Report, *supra* note 15 at 246.

[99] *Ibid* at 249, 264.

[100] UK, Law Commission, *Contributory Negligence as a Defence in Contract* (Report No 219, 1993) at para 3.60.

[101] *Ibid* at para 3.34. The Commission did not agree that uncertainty would be a serious obstacle in relation to breaches of a duty of reasonable care.

more reason to resist the plaintiff's claim until the plaintiff's resources were exhausted. This would be a particular problem in consumer contracts.[102] The Commission explained:

> If the defendant commits himself to a strict obligation regardless of fault, the plaintiff should be able to rely on him fulfilling his obligation and should not have to take precautions against the possibility that a breach might occur. This is the position under the present law and we consider that it would be wrong in principle to deviate from it. The rules on mitigation, although not a perfect substitute for apportionment, mean that the plaintiff is not entitled to act unreasonably once he is aware of his loss or of the defendant's breach.[103]

Further, the Commission was concerned that an increase in uncertainty in contract would "make settlements more difficult to achieve, payments into court harder to assess, and trials longer and more expensive",[104] noting that two respondents suggested that commercial contracts rarely provide for apportionment because of the potential uncertainties.

Professor Porat has argued that contributory negligence should be recognized as a general defence in contract law, describing, among other situations, those in which it seems unjustified for a party to fail to clarify a misunderstanding or to fail to cooperate in a manner that results in the other party's breach. In these cases, the aggrieved party should not be able to stand idly by, but should have some responsibility to reduce his or her potential losses before the breach. Examples include a plaintiff who negligently provides a builder confusing or contradictory instructions, or who negligently fails to inform a builder of geological obstacles that become known to the plaintiff during the term of a contract, resulting in a breach of a strict term that the construction will be completed by a specified date.[105] In such cases, the breach does not relate to a duty of care, and the plaintiff's negligence may not amount to a breach of a duty of good faith[106] or release the builder from the contractual term, but it would be unfair for the plaintiff to benefit from the breach. He notes that the courts would have to apply the defence with care, beginning with the proposition that the aggrieved party is entitled to full compensation. However, apportionment may often be beneficial to the plaintiff, as the alternative may be legal consequences for unreasonable conduct that lead to an 'all or nothing' result:

> Recognizing a contributory negligence defence ... would not significantly impair reliance and planning ability, would lead to just and fair results, and would encourage cooperation, solidarity and caution. It would also provide incentives toward the fulfilment of contracts and the mitigation of damages resulting from breach.[107]

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[102] *Ibid* at paras 3.35-3.37. Issues specific to consumers could be dealt with in consumer protection legislation; see *The Consumer Protection Act*, CCSM, c C200.

[103] *Ibid* at para 4.2.

[104] *Ibid* at para 4.6. The Commission also felt that apportionment would "be contrary to legal and social policy where Parliament has deliberately imposed on the defendant a strict contractual obligation in order to protect consumers and other potentially vulnerable contractors": at para 4.6.

[105] Porat "A Comparative Fault Defense in Contract Law", *supra* note 97; Porat "Contributory Negligence in Contract Law: Toward a Principled Approach", *supra* note 97. The example is adapted from *Lesmeister v Dilly*, 330 NW 2d 95 (1983).

[106] See e.g. *Transamerica Life Canada v ING Canada* (2003), 68 OR (3d) 457 (CA).

[107] Porat, "Contributory Negligence in Contract Law: Toward a Principled Approach", *supra* note 97 at 169.

In Ireland, under the *Civil Liability Act, 1961*, apportionment for contributory negligence is available for any "wrong", which includes any breach of contract.[108] Contributory negligence includes the negligence or want of care of the plaintiff or of one for whose acts he is responsible, as well as a negligent or careless failure to mitigate damage. The court will reduce the damages recoverable by the amount that it "thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant".[109]

The UNIDROIT Principles of International Commercial Contracts also provide for a reduction in damages for contributory negligence:

> Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of the parties.[110]

The New Zealand Law Commission recommended that apportionment for both contributory negligence and contribution among wrongdoers be available in respect of any "loss or damage, whatever the legal basis of liability, whether tort, breach of contract, breach of trust, or otherwise".[111]

In 1988, the Scottish Law Commission recommended that apportionment for contributory negligence should be available where the defendant is in breach of a contractual duty of care, but not where the contractual breach does not depend on negligence.[112] In 1999, the Commission reconsidered its position:

> The main reason for this Commission's [1988] recommendation that contributory negligence should not be available to the defender where the defender's breach did not consist of negligence was that where the defender's fault was irrelevant to the breach, the pursuer's fault should also be irrelevant. This, however, does not necessarily follow. The fact that the party in breach is liable notwithstanding absence of fault does not necessarily mean that liability should extend to loss or damage which was partly caused by the aggrieved party. In any event it could be provided, as in the Unidroit *Principles*, that the conduct of both parties can be taken into consideration where both have contributed to the loss or harm.

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[108] *Supra* note 59 at ss 2, 35. "Wrong" also includes a tort and breach of trust, whether or not the act is also a crime or is intentional.

[109] *Ibid.* s 34(1).

[110] International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (2010), Article 7.4.7, online: <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

[111] With the exception of debt and maritime liability actions: NZ, Law Commission, *Apportionment of Civil Liability* (Report No 47, 1998) at 16, 22-24 [New Zealand Report]. However, apportionment would be based on the proportion of loss attributed to the plaintiff, which suggests apportionment on the basis of causation, rather than blameworthiness.

[112] Scottish Law Commission, *Civil Liability – Contribution* (Report No 115, 1988).

> It was also said that to allow contributory negligence to operate in all contractual cases would weaken the position of consumers and give rise to unacceptable uncertainty in commercial dealings. Neither argument now seems convincing. The present law does not prevent arguments about who caused loss or harm. It just forces the arguments into an unrealistic framework where only extreme solutions are possible and [where] there is no room for fair and reasonable results, based on an apportionment of blame. It is difficult to believe that that is in the interests of either consumers or commercial contracting parties.[113]

The Scottish Commission reasoned that "it may be a matter of chance whether an obligation is expressed as an obligation to achieve a result or to use all reasonable care and skill to achieve a result".[114] It recommended that "where loss or harm is caused partly by a breach of contract and partly by the act or omission of the aggrieved party, the amount of damages should be reducible to take account of the extent to which the aggrieved party's conduct contributed to the loss or harm, the conduct of both parties being taken into account."[115]

After careful consideration, the Commission recommends that apportionment for contributory fault should be available in respect of any breach of contract that creates a liability for damages. As in the case of apportionment for intentional and strict liability torts, and apportionment for breach of fiduciary duty under principles of equity, the Commission does not consider that the concepts of contributory negligence and breach of contract are inherently contradictory. The plaintiff will be relieved of proof of fault where there is a breach of a strict contractual term, but that does not mean that the plaintiff's conduct is always irrelevant. In cases where the plaintiff's conduct is clearly unreasonable and contributes to the damage suffered, apportionment may be appropriate and consistent with the fundamental purpose of promoting fairness between the parties.

The Commission is not persuaded that the consequences of this recommendation would be an unacceptable increase in uncertainty in the law. The Commission agrees with the Scottish Law Commission that the current 'all or nothing' approach does not necessarily invite certainty. Courts are regularly required to interpret the actions of parties to a contract and determine the consequences, but in many cases do not have the flexibility to take into account all of the relevant circumstances. The British Columbia Supreme Court explained:

> This application of fairness relates primarily to the failure of traditional concepts in contract law to address grey areas. Causation and remoteness, for example, operate on an all or nothing basis. If a plaintiff's actions are unreasonable to the point they sever the chain of causation or the loss is classified as "remote" then the plaintiff is not entitled to recover any damages. Alternatively, if the plaintiff's behaviour falls short of breaking causation, they are entitled to full recovery. Furthermore, mitigation may be insufficient because it cannot apply until after the plaintiff has knowledge of the loss.[116]

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[113] Scottish Law Commission, *Report on Remedies for Breach of Contract* (Report No 174, 1999) at paras 4.6, 4.8 [footnotes omitted].

[114] *Ibid* at para 4.11.

[115] *Ibid* at para 4.13.

[116] *Seaboard Life Insurance v Bank of Montreal* (1999), 48 B.L.R. (2d) 77 (BCSC) at para 188, varied on other grounds, *Seaboard Life Insurance v Bank of Montreal*, *supra* note 85.

As in tort law, questions of apportionment will arise only where it is first found that the loss or injury was in fact caused by both the plaintiff and defendant, under standard causation principles. In accordance with Recommendation 2, apportionment should be based on both the blameworthiness and causal relevance of the parties' conduct.

As discussed earlier in this report, the concept of comparative blameworthiness has developed in tort law as a gauge of the amount by which each party fell short of the standard of care required of that person in the circumstances. While standard of care principles are "not fundamental to contract",[117] courts regularly assess the conduct of parties to a contract, to determine whether a fundamental breach has occurred, for example. As in cases of strict liability and intentional torts, apportionment for contributory negligence may frequently not be appropriate in a case of a strict breach of a contractual term. The starting point of any analysis is that parties to a contract are entitled to rely on the terms of the agreement and are obligated to carry out their part of the bargain. The terms of the contract and the intentions of the parties should prevail. As explained in *Avco Financial Services* (with respect to negligent misrepresentation), the focus in relation to the question of contributory fault then broadens to all of the events that caused the loss:

> The injured party's conduct, in all the circumstances surrounding that event, must be considered in order to determine whether it acted reasonably in its own interest or whether it contributed to the loss by its own fault. The circumstances surrounding the event that occasioned the loss, depending on the particular facts of the case, may be much wider in scope than the circumstances surrounding the negligent misrepresentation.[118]

The Scottish Law Commission offered this comparison:

> The introduction of apportionment in contract cases might be thought to give rise to the prospect of P being liable to a deduction in his damages because he has relied on D to perform his part of the contract and has failed to check, supervise or otherwise guard against breach of contract by D. The approach of the courts to the question of whether conduct in fact amounts to contributory negligence suggests that this will usually be unlikely. For instance, it has been said that the scope for contributory negligence may well be limited in the case of negligent misstatement:
>
> > If it is reasonable to rely on [the statement], it is difficult to envisage circumstances where as a matter of fact it would be negligent to do so.
>
> By the same reasoning, the contractual undertaking of a task by D will normally entitle P to rely on D carrying out his undertaking and acting carefully in doing so.[119]

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[117] *The Owners, Strata Plan NW 3341 v Canlan Ice Sports Corp*, 2001 BCSC 1751 at para 3.

[118] *Supra* note 39 at para 32.

[119] Scottish Law Commission, *Contributory Negligence as a Defence in Contract* (Working Paper No 114, 1990) at 8 [footnote omitted]. The New Zealand Commission included these concepts in its draft Act. Contributory negligence does not include a failure to do anything in justified reliance on a contract, rule of law or enactment or a failure to take a precaution against default by the wrongdoer in the performance of an obligation under a contract: New Zealand Report, *supra* note 111 at 22.

Similarly, a party should be entitled to rely on an implied warranty that a product is reasonably fit for its intended purpose, without further inspection.[120] However, apportionment may be appropriate if the plaintiff's actions, in addition to the defendant's fault in breaching a strict contractual term, were unreasonable in the circumstances and contributed to his or her loss. This assessment must be made within the context of the entire circumstances, and in particular the contractual obligations undertaken by the parties.

RECOMMENDATION 12

The Act should provide for apportionment of damages for contributory fault in respect of any breach of contract that creates a liability for damages.

4. Breach of Statutory Duty

It is settled law in Canada that a breach of a statutory duty does not of itself constitute negligence or give rise to an action in tort or a private law remedy. However, proof of a statutory breach that causes damages may be evidence of negligence, and the statutory standards may be relevant to the standard of care and the assessment of reasonable conduct.[121]

Although breach of a statutory duty does not itself create liability in private law, some statutes do expressly create a right of action. The Ontario Law Reform Commission considered that "in such cases, in the absence of a contrary intention in the legislation, there seems no reason to exclude apportionment".[122]

The *Uniform Contributory Fault Act* includes in the definition of 'fault' "a breach of a statutory duty that creates a liability for damages".[123] The United Kingdom statute includes a "breach of statutory duty or other act or omission which gives rise to a liability in tort ...".[124]

After reviewing Manitoba statutes that expressly create a right of action, the Commission has concluded that the new Act should not include a general provision for apportionment in cases of breach of statutory duty. Statutes creating rights of action do not occur frequently in the statute book. In some cases, the legislation creating the right has addressed the issue, and creates a right of apportionment for contributory negligence and among those liable to pay damages.[125]

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[120] See *Mowbray v Merryweather*, [1895] 2 QB 640 (CA); *British Oil and Cake Company Limited v Burstall and Company* (1923), 39 TLR 406; *The Sale of Goods Act*, CCSM c S-10.

[121] *The Queen (Can) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205. See also *Ryan v Victoria (City)*, [1999] 1 SCR 201; *Apotex v Syntex Pharmaceuticals International Ltd*, 2005 FCA 424, [2006] 3 FCR 318; *Galaske v O'Donnell*, [1994] 1 SCR 670, 112 DLR (4th) 109; *Christie (Guardian of) v Insurance Corp of British Columbia* (1993), 79 BCLR (2d) 370 (BCCA).

[122] Ontario Report, *supra* note 15 at 249.

[123] Uniform Act, *supra* note 23, s 1.

[124] *Law Reform (Contributory Negligence) Act 1945*, *supra* note 44, s 4. However, in the UK, the tort of breach of statutory duty is available in some circumstances.

[125] For example, section 29 of *The Livestock Industry Diversification Act*, CCSM, c L175, deals with the escape of game production animals. If damage results or expenses are incurred in capturing or transporting the animal, the operator of the farm and the owner of the animal are jointly and severally liable for the damage or expense, except to

In other cases, the statute creates a comprehensive scheme based on specific objectives. For example, the recently enacted *Franchises Act*[126] regulates a specific type of business relationship. In recognition of the imbalance of power inherent in the franchise relationship, the Act includes provisions that attempt to ensure that full information is provided to prospective franchisees and that franchisees receive a measure of protection throughout the franchise relationship. A right of action in damages is provided for franchisees in certain circumstances. In the Commission's view, the application of apportionment principles is more appropriately dealt with within that scheme, rather than in other legislation of general application.

With the reforms proposed in this report, it will be important that the government review other statutes to determine whether changes are necessary to address apportionment principles. At that time, any necessary amendments to other legislation to ensure consistency of approach should be made.

RECOMMENDATION 13

The Act should not provide for apportionment of damages for contributory fault in respect of a breach of a statutory duty that creates a liability for damages.

RECOMMENDATION 14

All Manitoba statutes that create a right of action for damages should be reviewed for consistency with the recommendations in this report and the apportionment principles in the Act.

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the extent of any contributory negligence. The section also provides for contribution among those liable for the damage.

[126] *Franchises Act*, CCSM, c F156.

CHAPTER 5

CONTRIBUTION AMONG WRONGDOERS

A. SCOPE OF CONTRIBUTION

The previous chapter dealt in some detail with the appropriate scope of apportionment in cases where the plaintiff has been contributorily negligent. The scope of apportionment for contributory negligence has been the subject of some debate because it concerns principles of fairness as between two quite distinct parties: the defendant who caused harm and the plaintiff who suffered harm. A discussion of the scope of contribution among defendants, each of whom contributed to and is liable for the same harm, is simpler.

The Tortfeasors and Contributory Negligence Act currently provides that the right to contribution applies to tortfeasors:

> 2(1) Where damage is suffered by any person as a result of a tort, whether a crime or not, ...
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person is entitled to recover contribution from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.[1]

The Manitoba Act is clearer than the legislation of some other jurisdictions in that the right to contribution is not restricted by the words 'negligence' or 'fault', but it does confine the right to actions founded in tort.

Law reform bodies have been nearly unanimous in their recommendations that the right to contribution among wrongdoers should be extended to any persons liable on any grounds for the same damage. This recommendation has been made by the Ontario Law Reform Commission and the law reform bodies of the United Kingdom, Scotland, New Zealand, New South Wales, Victoria and Hong Kong.[2]

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[1] *The Tortfeasors and Contributory Negligence Act*, CCSM, c T90 [Manitoba Act].

[2] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) at 82-3 [Ontario Report]; Law Commission (UK), *Law of Contract: Report on Contribution* (Report No 79, 1977) at para 33 [UK Report]; Scottish Law Commission, *Report on Civil Liability: Contribution* (Report No 115, 1988) at paras 3.1-3.5 [Scotland Report]; NZ, Law Commission, *Apportionment of Civil Liability* (Report No 47, 1998) at 16 [New Zealand Report]; New South Wales Law Reform Commission, *Contribution between persons liable for the same damage* (Report No 89, 1999) at paras 3.7-3.29 [New South Wales Report]; Victoria, Chief Justice's Law Reform Committee, *Contribution* (1979) at para 5; Law Reform Commission of Hong Kong, *Report on the Law Relating to Contribution Between Wrongdoers (Topic 5)* (1983) at para 5.3 [Hong Kong Report]. In 1977, the South Australian Law Reform Committee recommended that claims for contribution be permitted where one defendant is liable in tort and another in contract or by statute, at 10-11. It also considered that there may be good reason for "amendments based on contribution which arises solely in contract or by the operation of the general law", as proposed by the UK Law Commission, but that this was outside the scope of the Committee's reference: Law Reform Committee of South Australia to the Attorney General, *Relating to Proceedings Against and*

As the Ontario Commission explained,

> the very reasons that made the rule in *Merryweather v. Nixan* unfair apply with equal force to situations where D1 and D2 are concurrent contract breakers, or where one is a contract breaker and the other a tortfeasor. The absence of a right to contribution allows the injured person to choose the defendant who is to bear the entire loss for which two or more defendants are legally responsible. If the person sued by the plaintiff has no claim to contribution, the other will have obtained a benefit that it is unjust to retain. It has been precisely to avoid this kind of injustice that, in other contexts, equity, the common law, and statutes have provided rights of contribution and indemnity. The particular legal categories into which the primary liabilities of D1 and D2 to P fall ought to be of no relevance to the secondary legal rights and duties arising between D1 and D2.[3]

In the words of the Law Reform Commission of Hong Kong, "[t]he present restriction of the right to contribution to tortfeasors cannot be justified on any policy grounds, and is merely an accident of legal history".[4]

The United Kingdom Law Commission described the situation in which a wrongdoer might be required to meet a plaintiff's claim in full without having a remedy against another wrongdoer who is subject to an equally valid claim by the plaintiff as a gap in the law that should not be left unfilled. An extension of the right to contribution to all areas of liability would fill any gaps in the law where contribution is not available and allow courts greater flexibility where the existing rules would otherwise work unjustly.[5] The Commission's recommendations were implemented in the *Civil Liability (Contribution) Act 1978*, with broad wording:

> 1 Entitlement to contribution.
>
> (1) Subject to the following provisions of this section, *any person liable in respect of any damage* suffered by another person may recover contribution from *any other person liable in respect of the same damage* (whether jointly with him or otherwise).
>
> 6 Interpretation.
>
> (1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (*whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise*).[6]

Similar wording exists in the *Wrongs Act 1958* of Victoria, Australia.[7]

Contributions Between Tortfeasors and Other Defendants (Report No 42, 1977) at 12 [South Australia Report]. On the other hand, the Law Reform Commission of British Columbia preferred that contribution legislation be limited to a breach of a duty of care arising from a contract that creates a liability for damages: Law Reform Commission of British Columbia, *Report on Shared Liability* (Report No 88, 1986) [BC Report].

[3] Ontario Report, *ibid* at 70.

[4] Hong Kong Report, *supra* note 2 at para 5.3.

[5] UK, Law Commission, *Feasibility Investigation of Joint and Several Liability* (Consultation Paper, 1996).

[6] (UK), c 47 [emphasis added].

[7] *Wrongs Act 1958* (Vic), s 23B.

The recommendation of the Institute of Law Research and Reform of Alberta was to similar effect:

> In the words of Professor Weinrib "contribution is a unitary notion embodying a fundamental concept of restitutionary fairness that transcends the categories of contract and tort and for which those categories are irrelevant".
>
> ...
>
> We recommend that the statutory right of contribution should be extended so as to comprehend cases in which the same damage is caused by two breaches of the same contract or two independent contracts or by a breach of contract and by a tort. The right to contribution should not be confined to cases in which the breach of contract consists of a negligent failure to perform a contractual obligation but should extend to all breaches of contract including intentional breaches. The Statute should not, however, override contracts.[8]

The Alberta Institute recommended that the right of contribution extend as well to breaches of trust, but that this should be included in the *Trustee Act*.

The Institute's approach was included in the Uniform *Contributory Fault Act*, with wording that is more limited than that of the United Kingdom:

> "wrongful act" means an act or omission that constitutes
>
> (a) a tort,
> (b) a breach of contract or statutory duty that creates a liability for damages, or
> (c) a failure of a person to take reasonable care of his own person, property or economic interest, whether or not it is intentional.[9]

The Commission agrees that there is no principled reason to restrict the right to contribution to tortfeasors, and that the right should be extended to wrongdoers responsible for the same damage on any ground of liability. The extension of the right to different grounds of liability, with different assessments of damages and varying underlying principles, may complicate the work of the courts. However, the common thread is that the acts or omissions of the wrongdoers must cause the same harm. Given the complexity of many current court cases with multiple defendants and overlapping grounds of liability, there is no reason to believe that extending the right to contribution in the interests of achieving fairness between defendants will be a significant additional burden.

The Commission prefers the simple and inclusive approach taken in the United Kingdom.

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[8] Institute for Law Research and Reform of Alberta, *Concurrent Contributory Negligence and Wrongdoers* (Report No 31, 1979) at 48, 51 [Alberta Report], citing Ernest Weinrib, "Contribution in a Contractual Setting" (1976) 54 Can Bar Rev 338 at 344–45.

[9] Uniform Law Conference of Canada, *Uniform Contributory Fault Act*, s 1, online: <http://www.qp.govsk.ca/documents/ULCC/1984ULCC0066.pdf> [Uniform Act].

RECOMMENDATION 15

Any person liable in respect of any damage suffered by another person should have a right to recover contribution from any other person liable in respect of the same damage.

B. RELEASE BAR AND JUDGMENT BAR RULES

In general, joint tortfeasors are those who cause a single tort together with a common purpose.[10] At common law, because a joint tort was a single wrongful act and a single cause of action, a release by a plaintiff of a claim against one joint tortfeasor usually released all other joint tortfeasors. Similarly, a judgment against one joint tortfeasor, even if unsatisfied, released all other joint tortfeasors. These rules, the 'release bar rule' and the 'judgment bar rule' did not apply to several tortfeasors, even if their acts combined to cause a single injury.

The New Brunswick Court of Appeal described the release bar rule as follows:

> The established and time-honored common law rule is that release of one joint tortfeasor, whether under seal or by way of accord and satisfaction, releases all other joint tortfeasors. However, it has been described as pernicious and nefarious for "discouraging settlements or ensnaring the unwary." See *The Law of Torts*, by John G Fleming, 9th ed. page 292.
>
> Not surprisingly, as soon as the rule was pronounced, lawyers set out to find legal ways to circumvent it to allow the plaintiff to settle part of the claim with a defendant looking for a way to limit personal liability to the plaintiff, without jeopardizing the plaintiff's position vis-à-vis other joint tortfeasors. The device commonly used to escape the application of the rule is through the "covenant not to sue".[11]

A potential plaintiff could enter into an agreement with a joint tortfeasor that merely promised not to sue that tortfeasor (a covenant not to sue). The claim was not released and the cause of action was preserved. The plaintiff was then still able to sue other joint tortfeasors.

The Manitoba *Tortfeasors and Contributory Negligence Act* abolishes the judgment bar rule with respect to joint tortfeasors:

> 2(1) Where damage is suffered by any person as a result of a tort, whether a crime or not, (a) judgment recovered against any tortfeasor liable in respect of that damage is

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[10] Persons may also be joint tortfeasors where one is the principal of or is vicariously responsible for the other or a duty imposed jointly upon both tortfeasors is not performed: *BPB v MMB*, 2009 BCCA 365 at para 107, leave to appeal to SCC refused [2010] SCCA No 90; Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stevens, 1951) at 1.

[11] *MacArthur v S Bransfield Ltd*, 2003 NBCA 71 at paras 1-2. See also *Wheeler v Rupp*, 2007 ABQB 119, 413 AR 197; in spite of academic and some judicial criticism (see *CRC-Evans Canada Ltd v Pettifer* 197 AR 24 (QB)) the common law rule still remains in Alberta.

> not a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor, in respect of the same damage; ... .[12]

However, this provision has been overtaken and is no longer necessary. Both the judgment bar rule and the release bar rule were abolished in Manitoba with respect to all civil actions in 1989 by *The Court of Queen's Bench Act*:

> Joint liability not affected
>
> 95 Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one does not preclude judgment against the other in the same or a separate proceeding.[13]

RECOMMENDATION 16

The Act should not deal with the release bar rule or the judgment bar rule.

C. MULTIPLE ACTIONS

1. Damages in Subsequent Action

In order to encourage the joinder of parties and efficient litigation, the Manitoba Act and some other apportionment statutes provide that if more than one action is brought against multiple tortfeasors in respect of the same damage, the sums recoverable in the second and subsequent judgments shall not exceed that of the first.[14] At common law, a plaintiff could obtain a different calculation of damage in a subsequent action.

Further, the Manitoba Act and some other statutes provide that the plaintiff is not entitled to costs in second or subsequent actions unless the court is of the opinion that there were reasonable grounds for bringing a separate action. The provisions in the Manitoba Act are nearly identical to those that were originally enacted in the United Kingdom *Law Reform (Married Women and Tortfeasors) Act 1935*.[15]

Different views have been expressed as to the effectiveness of these restrictions. The United Kingdom Law Commission and the Law Reform Commission of Hong Kong

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[12] Manitoba Act, *supra* note 1.

[13] *The Court of Queen's Bench Act*, CCSM c 280. Other jurisdictions have similarly abolished the rule; e.g. *Courts of Justice Act*, RSO 1990, c C-43; *Taylor Made v Atlific Inc*, 2012 ONCA 459; *Law and Equity Act*, RSBC 1996, c 253, s 53; *Judicature Act*, RSPEI 1988, c J-2.1, s 64.

[14] Similar provisions in Nova Scotia were recently applied in *Kasperson v Halifax (Regional Municipality)*, 2012 NSCA 110. The plaintiff was not barred from a second action against a concurrent tortfeasor, but was limited to the amount of damages awarded in the first action in small claims court.

[15] *Law Reform (Married Women and Tortfeasors) Act, 1935* (UK), 25 & 26 Geo V, c 30.

recommended that the restriction on damages be abolished but the costs sanction be retained.[16] In Alberta, the Institute of Law Research and Reform recommended that both provisions should continue to apply.[17]

The United Kingdom and Hong Kong Commissions held the view that a restriction on subsequent damages can be unfair if the liability of the first defendant is limited (for example, by contract) and the second is not. The wording proposed in the Uniform *Contributory Fault Act* resolves this concern, making it clearer that the restriction as to the amounts recoverable in subsequent actions applies only if the first judgment determined the *total* liability for damages:

> Previous judgment binding in second action
>
> 16(1) Where a judgment determines the total liability for damages of concurrent wrongdoers in an action against one or more of them, the person suffering the damage is not entitled to have the total liability determined in a higher amount by a judgment in the same or any other action against any other concurrent wrongdoer.
>
> Costs
>
> (2) Except in an action first taken against a concurrent wrongdoer, the persons suffering damage is not entitled to costs in an action taken against any other concurrent wrongdoer unless the court is of the opinion that there were reasonable grounds for bringing more than one action.[18]

The Law Reform Commission of British Columbia suggested that while the wording of the Uniform Act was an improvement, it could be further refined:

> One point of concern with the drafting of s. 16(1) of the Uniform Act is the reference to "total liability for damages." It suggests that a finding with respect to the liability of concurrent wrongdoers not joined in the proceedings, rather than an assessment of the whole of the plaintiff's damages, may be binding on the plaintiff. In our view, a plaintiff should be able to proceed against unjoined defendants in subsequent proceedings even if their liability was addressed in a prior judgment. Section 16(1) should be recast as follows:
>
> > A person who receives a judgment against a concurrent wrongdoer in which the whole of his damages are assessed, is not entitled to have damages assessed in a higher amount in proceedings against any other concurrent wrongdoer.[19]

The Commission agrees that this is a useful clarification.

Recently, the High Court of Australia held that a provision in the Western Australia *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* does not apply to limit the amount of damages in a second action when the 'first judgment' is a consent judgment

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[16] UK Report, *supra* note 2 at paras 36-41; Hong Kong Report, *supra* note 2 at paras 9.1-9.2. The costs sanction was felt to be preferable because of the courts' discretion; however, as noted below Manitoba courts possess significant discretion regarding costs in any event.

[17] Alberta Report, *supra* note 8 at 29-30.

[18] Uniform Act, *supra* note 9.

[19] BC Report, *supra* note 2 at 16-17.

filed after proceedings have commenced solely to give effect to a settlement of the claim.[20] The Western Australia Act has the same wording as the Manitoba Act on this point, referring to "the amount of the damages awarded by the judgment first given".[21]

The High Court found that such a consent judgment cannot amount to 'damages awarded' because there had been no judicial determination of liability and no resulting award of damages. The concern that the provision is intended to address is "successive actions in which a plaintiff, discontented with the outcome in the first action, seeks another bite of the cherry".[22] Therefore, a consent judgment that gives effect to a settlement agreement with one tortfeasor does not restrict the plaintiff's right to recover the full amount of the loss from other concurrent tortfeasors.

The Queen's Bench Rules define 'judgment' as "a decision that finally disposes of all or part of an application or action on its merits or by consent of the parties, and includes a judgment in consequence of the default of a party".[23] A similar definition should be included in the new Act. The definition and the recommendation below should resolve any confusion and clarify that a judgment limits a plaintiff's assessment of damages in subsequent proceedings where the judgment, however obtained, assesses the whole of those damages.

RECOMMENDATION 17

The Act should define 'judgment' as a decision that finally disposes of all or part of an application or action on its merits or by consent of the parties, including a judgment in consequence of the default of a party.

RECOMMENDATION 18

The Act should provide that a person who receives a judgment against a concurrent wrongdoer in which the whole of his or her damages are assessed is not entitled to have damages assessed in a higher amount in proceedings against any other concurrent wrongdoer.

2. Costs

The Law Reform Commission of British Columbia expressed doubt as to whether there is a need for apportionment legislation to deal with costs, given the broad discretion regarding costs that is retained by the courts. If subsequent actions prove to be unnecessarily costly the court can exercise its discretion to refuse costs, or to award costs against the plaintiff.[24]

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[20] *Newcrest Mining Limited v Thornton*, [2012] HCA 60. Equivalent provisions exist in New South Wales, Queensland and the Northern Territory; see also *Nau v Kemp & Associates*, [2010] NSWCA 164.
[21] *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*(WA), s 7(1)(b).
[22] *Supra* note 20 at para 30.
[23] *Court of Queen's Bench Rules*, Man Reg 553/88, Rule 1.03.
[24] BC Report, *supra* note 2 at 16-17.

The Commission agrees that the discretion of the court and the flexibility provided by *The Queen's Bench Rules* is sufficient to allow the court to deal with these circumstances without further elaboration in the new Act.

D. CONTRIBUTION AFTER SETTLEMENT

The Manitoba Act and several other apportionment statutes are silent with respect to contribution after settlement. The Ontario, Nova Scotia and Saskatchewan Acts do provide for contribution after settlement, and require the tortfeasor settling the damage to satisfy the court that the amount of the settlement was reasonable. Section 2 of the Ontario Act provides:

> A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.[25]

1. Contribution After Full or Partial Settlement

Under current tort law, a plaintiff is entitled to full compensation for his or her loss, under principles of joint and several liability. Although the Manitoba Act is silent as to settlements, each defendant is entitled to pursue compensation from any other defendant "who is, or would if sued have been, liable in respect of the same damage".[26]

Where a defendant settles with a plaintiff for the full amount of the plaintiff's damages, other defendants are relieved of their obligation to compensate the plaintiff. A right to contribution ensures that settlements are encouraged and fairness is promoted among all parties. To protect the non-settling defendants who may be obligated to pay contribution, the Ontario, Nova Scotia and Saskatchewan Acts and the Uniform Act each include a qualification that the amount of the settlement for which contribution is sought must have been reasonable.[27]

Partial settlements, those where a plaintiff settles with one or more defendants and does not release other potential defendants from liability, are more complicated, and law reform bodies have had mixed opinions as to the approach that would best achieve fairness among all parties. Although there are various options, the question is essentially whether a settling defendant should be allowed to claim contribution, or should be subject to a claim for contribution, from a defendant who proceeds to judgment.

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[25] *Negligence Act*, RSO 1990, c N.1, s 2 [Ontario Act].

[26] Manitoba Act, *supra* note 1, s 2(1)(c).

[27] Ontario Act, *supra* note 25, s 2; *Tortfeasors Act*, RSNS 1989, c 471, s 4(2); *Contributory Negligence Act*, RSS 1978, c C-31, s 10; Uniform Act, *supra* note 9, s 12(3).

The Institute for Law Research and Reform of Alberta emphasized the goal of encouraging settlements. The Institute felt that if the first defendant to settle a claim is not released from liability to other defendants for contribution, and from the prospect of further litigation, a defendant would have little incentive to settle. The Institute accordingly recommended that there should be no right of contribution between settling and non-settling defendants in the case of a partial settlement, and that fairness among the parties should be achieved by reducing the plaintiff's claim against the non-settling defendants. The claim should be reduced by the amount of the first defendant's share of the liability to the plaintiff.[28] The effect of this approach is that depending on whether the settlement was, in hindsight, too low or too high, the plaintiff may not recover for the full amount of the loss, or may be overcompensated. In effect, settlement converts joint and several liability to proportionate liability as between settling and non-settling defendants.[29]

The Institute's recommendation was implemented in the *Uniform Contributory Fault Act*, which provides:

> Where the person suffering the damage does not release all concurrent wrongdoers, the liability for damages of those concurrent wrongdoers who are not released is reduced by an amount of the damages proportionate to the degree to which the wrongful acts of the concurrent wrongdoers who are released contributed to the damage, and there shall be no contribution between those concurrent wrongdoers who are released and those who are not released.[30]

The Law Reform Commission of British Columbia agreed with this approach in its 1986 report, with the modification that a person who settles in the case of a partial release should be entitled to contribution from all other defendants who are released by the plaintiff.[31]

In a recent consultation paper, the British Columbia Law Institute agreed that the liability of a non-settling defendant should be reduced by an amount proportionate to the degree to which the settling defendant is found to be at fault, and tentatively recommended that a settling defendant should not be liable to pay contribution to any other defendant. With respect to a settling defendant's right to contribution from non-settling defendants, the Institute tentatively recommended no legislative change, so that the right to contribution would continue to exist.[32]

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[28] Alberta Report, *supra* note 8 at 56-61. The Institute noted that there are other options for determining the amount by which the plaintiff's claim should be reduced. These include reducing the claim by the amount paid to the plaintiff by the settling defendant, or by the greater or the lesser of the amount paid by the settling defendant and that defendant's share of the liability. Reduction of the claim by the greater of the amount paid by the settling defendant and that defendant's share of the liability is the approach taken in the Irish *Civil Liability Act, 1961*, s 17(2) and the Tasmanian *Wrongs Act 1954*, s 3(3).

[29] E.g.: the plaintiff suffers damages of $5000 and settles with the first defendant for $1,000, believing that defendant to bear a low proportion of fault. If a court subsequently finds that fault was equally shared between the settling defendant and a non-settling defendant, the plaintiff will receive $2,500 from the non-settling defendant and will be undercompensated by $1,500. If contribution is allowed, the non-settling defendant would pay the plaintiff $4,000 and claim $1,500 in contribution from the settling defendant.

[30] Uniform Act, *supra* note 9, s 11(2).

[31] BC Report, *supra* note 2 at 26-27.

[32] British Columbia Law Institute, *Consultation Paper on Contribution After Settlement under the Negligence Act* (March 2013) at 38-42. The leading case currently in BC is *British Columbia (Public Trustee) [Tucker] v Asleson* (1991), 86 DLR (4th) 7362 BCLR (2d) 78 (SC), aff'd in part (1993), 102 DLR (4th) 518, 78 BCLR (2d) 173 (CA),

The Ontario Law Reform Commission canvassed a number of alternatives, ultimately deciding against the proposed Alberta model. The Commission recommended that a settling defendant should remain liable to a non-settling defendant who is required to pay more than his or her share of the plaintiff's loss.[33] If a plaintiff obtains a judgment against a non-settling defendant, the damages should be reduced by any consideration already paid under a settlement with another defendant (this is the existing common law rule against double recovery).[34] As well, if a settling defendant has a duty to contribute, "it is only fair that he should have a right to contribution when he has made a poor settlement".[35]

The New South Wales Law Reform Commission, the United Kingdom Law Commission and the Law Reform Commission of Hong Kong also preferred this approach.[36] As well, this is the result under the federal *Marine Liability Act*[37] and under the United Kingdom *Civil Liability (Contribution) Act 1978*.[38]

The current system, endorsed by the Ontario Commission and others, protects plaintiffs' interests and preserves the principle of joint and several liability, but carries the disadvantage of a lack of finality for settling defendants. On the other hand, the Ontario Commission has pointed out that the lack of finality may in fact have the effect of encouraging settlements, since a defendant knows that if he or she settles too generously there will be an opportunity to recover.[39] The model proposed by the Alberta Institute, the Law Reform Commission of British Columbia and the British Columbia Law Institute has the advantage of promoting certainty for defendants, but may discourage plaintiffs from settling, since the plaintiff would bear any shortfall arising from a low settlement. In principle, it is also inconsistent with the goal of tort law to achieve full compensation for the plaintiff's loss.

There are many options that could be designed along the continuum between these two models, and there is no clearly optimal solution that will achieve fairness among plaintiffs and defendants in all fact situations. Significant advantages and disadvantages are associated with any model. The benefit of the current law is that the plaintiff's right to obtain full compensation is not arbitrarily compromised. There is scope for flexibility, so that parties are able to structure a wide range of settlements to protect their interests, manage their risks and achieve certainty as

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which held that a plaintiff's settlement with one defendant did not limit or bar a non-settling defendant's right to contribution from the settling defendant.

[33] Ontario Report, *supra* note 2 at 109. The appropriate share of the settling defendant may be subsequently determined by the court; the Ontario Court of Appeal has held that the court has jurisdiction to apportion fault against non-parties, such as settling defendants, in appropriate cases: *JM v Bradley* (2004), 71 OR (3d) 171, 240 DLR (4th) 435, 187 OAC 201; *Misko v John Doe*, 2007 ONCA 660, 87 OR (3d) 517, 286 DLR (4th) 304.

[34] *The Treaty Group v Drake*, 2007 ONCA 450, 86 OR (3d) 366.

[35] Ontario Report, *supra* note 2 at 107; see pages 98-109.

[36] New South Wales Report, *supra* note 2 paras 4.30–4.36; UK Report, *supra* note 2 at paras 55-59; Hong Kong Report, *supra* note 2 at 4.10–4.18, 5.4- 5.16.

[37] *Marine Liability Act*, SC 2001, c 6, ss 17-19.

[38] *Civil Liability (Contribution) Act 1978* (UK), c 47, s 1.

[39] Ontario Report, *supra* note 2 at 105. This would also be the case if the recent recommendations of the British Columbia Law Institute were adopted, *supra* note 32.

they see fit.[40] Courts have supported settlement agreements in recognition of the "overriding public interest"[41] in encouraging settlements. Case law is developing with respect to the timing and extent of disclosure that is required to ensure that fairness is achieved and the proper administration of justice is protected.[42] On balance, therefore, the Commission is inclined to the view that significant reform is not warranted.

RECOMMENDATION 19

The Act should provide that a person who gives consideration for a release of a claim

(a) has a right to recover contribution from another person liable in respect of the same damage; and

(b) is liable to pay contribution to another person liable in respect of the same damage,

in the amount that the court considers to be just and equitable having regard to the degree to which the fault of each person contributed to the damage.

2. Contribution Where the Settling Defendant is Not Liable

It sometimes happens that a defendant who settles with a plaintiff is subsequently found not to be liable to the plaintiff for the injuries suffered. In *Marschler v G Masser's Garage*, LeBel, J. said, with respect to the Ontario provision on settlements:

> ... the section was designed to encourage and foster settlements with a view to preventing litigation or its continuance, and it would be a very disappointed settler who discovered that by satisfying the Court of his complete innocence of blame at a

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[40] The two common examples are a *Pierringer* pact and a *Mary Carter* agreement. A *Pierringer* pact is a proportionate share agreement in which a plaintiff settles a claim with one or more defendants without releasing others. The plaintiff limits the claim against the non-settling defendants to their share of liability and indemnifies the settling defendant against any claims by the other defendants. The settling defendant agrees to cooperate with the plaintiff and not to seek contribution from the non-settling defendant. The settling defendant is then able to remove itself from the litigation. A *Mary Carter* agreement is one in which the settling defendant guarantees the plaintiff a certain level of recovery but remains in the lawsuit and may pursue counterclaims against the other defendants. The exposure of the settling defendant is capped at a specified amount and decreases in proportion to any monetary recovery above that amount. The settling defendant thus shares in the plaintiff's recovery: see for example *Moore v Bertuzzi*, 2012 ONSC 3248; *Amoco Canada Petroleum v Propak Systems Ltd* 2001 ABCA 110, 200 DLR (4th) 667. The origin of the *Pierringer* pact is *Pierringer v Hodge* (1963) 124 NW (2d) 106 (Wis SC). The *Mary Carter* agreement derives from *Booth v Mary Carter Paint Co* (1967) 202 So 2d 8 (Fl 2nd Dist CA). In *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC37, the Supreme Court of Canada endorsed the use of *Pierringer* pacts, and found that the settlement amounts provided in such agreements were protected against disclosure by settlement privilege.

[41] *JM v Bradley*, *supra* note 33 at para 65.

[42] *Amoco Canada Petroleum v Propak Systems Ltd*, *supra* note 40; *Aecon Buildings v Brampton (City)*, 2010 ONCA 898; *Sable Offshore Energy Inc v Ameron International*, 2011 NSCA 121; leave to appeal to SCC granted, [2012] SCR No 88.

> trial, he had thereby lost his right to collect what he had paid in settlement upon the assumption that he might ultimately be held liable in some degree.[43]

The court held that the word 'tortfeasor' in the beginning of section 2 of the Ontario Act includes a person "who impliedly assumes or admits liability when he enters into a settlement".[44]

The United Kingdom *Law Reform (Married Women and Tortfeasors) Act, 1935*,[45] like the Manitoba Act and the Alberta Act, did not refer to settlements. In *Stott v West Yorkshire Road Car Co Ltd*,[46] the English Court of Appeal held that a settlement in which the settling defendant did not admit liability could be the basis of a claim for contribution, but the settling defendant would have to establish that he or she was in fact liable to the plaintiff. However, Salmon, L.J., in dissent, preferred the approach of the court in *Marschler*.

In *Angeltvedt v Lawes*, the Alberta Court of Appeal also found the approach in *Marschler* to be compelling:

> The appellants fear that the respondent may seek to defeat their claim by confessing full responsibility for the accident and thereby absolving the appellants from the status of tortfeasors who can seek contribution from the respondent toward the settlement. However, the policy towards tortfeasors is to encourage settlement. Here the appellants have settled the plaintiff's claim by paying sums exceeding $400,000, and cannot be thought to have done so out of charity, or without liability to do so. We share the views of Wachowich J. in *Hannigan v. City of Edmonton* 1983 CanLII 1093 (AB QB), (1983) 47 A.R. 266 where he adopted the approach of Salmon, L.J. in *Stott v. West Yorkshire Road Car Co. Ltd.*, [1971] 3 All E.R. 534 at 539:
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> > I do not think when that section was enacted the legislature contemplated a situation in which a defendant paid out of charity or that a defendant would ever pay otherwise than because he thought he was liable, or, at any rate, partly liable. The legislature did not deal with what might have seemed to be a wholly unrealistic situation in which a defendant paid without liability to do so. If he did, there could, in no event, be any liability on the third party. In the present case, I do not consider that there was even the remotest chance that the defendants would have paid unless they were satisfied that there was a real risk that they were to blame.
>
> In our view, such a fear is so divorced from common sense that it is not a factor we take into account.[47]

After the decision in *Stott*, the English legislation was amended to provide that a defendant claiming contribution after settlement need no longer prove that he or she was in fact liable to the plaintiff. However, the defendant does have to show that if the factual allegations

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[43] *Marschler v G Masser's Garage*, [1956] OR 328 at 334, 2 DLR (2d) 484 (HC).
[44] *Ibid* at 335.
[45] *Supra* note 15.
[46] *Stott v West Yorkshire Road Car Co Ltd*, [1971] 3 All ER 534, [1971] 2 QB 651.
[47] *Angeltvedt v Lawes*, 1997 ABCA 2 at paras 4-5. BC courts have taken the opposite view: see *Canadian Coachways (Alberta) Limited v Reynolds* (1986), 4 BCLR (2d) 224 (BCSC); *Welk v Mantelli*, 1995 CanLII 583 (BCSC).

made against it were true, the defendant would have been liable. The United Kingdom *Civil Liability (Contribution) Act 1978* provides:

> A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.[48]

As the New South Wales Law Reform Commission has observed, "[t]his provision seems to leave D2 some room to resist D1's claim for the contribution on the grounds that D1 was never liable to P".[49] The requirement that the defendant would have been liable assuming the factual basis of the claim could be established was apparently inserted at the Committee stage review of the bill, and was intended to ensure that the settlement was *bona fide* and to exclude settlements made outside of the country, under a different legal system.[50] A concern with this approach, however, is that it could disadvantage a defendant who settles on the basis of an honest and reasonable assessment of his or her liability in an uncertain area of law that is later clarified.

The Institute of Law Research and Reform of Alberta argued:

> D1 has conferred a benefit on D2 by freeing him from liability to P. It is a sufficient safeguard that D1 must establish that the amount of the settlement is reasonable. It should not be necessary for him to establish that he was liable or even that he had reasonable grounds for believing that he was liable.[51]

The New South Wales Law Reform Commission took a similar view. Allowing the second defendant to resist the first defendant's claim to contribution would discourage the settlement of claims. Further, the second defendant has benefited by the first paying to the plaintiff a sum that the second would have been legally required to pay. The second defendant should, of course, still be able to contest the amount of damages and his or her own liability to the plaintiff.[52]

The *Uniform Contributory Fault Act* addresses this issue in subsection 12(3):

> Contribution when full release
>
> (3) Where all concurrent wrongdoers are released, a person who gives consideration for the release, *whether he is a concurrent wrongdoer or not*, is entitled to contribution in accordance with this Act from any other concurrent wrongdoer based on the lesser of (a) the value of the consideration actually given for the release; and
> (b) the value of the consideration that in all the circumstances it would have been reasonable to give for the release.[53]

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[48] *Civil Liability (Contribution) Act 1978* (UK), c 47, s 1(4).
[49] New South Wales Report, *supra* note 2 at para 4.21.
[50] Hong Kong Report, *supra* note 2.
[51] Alberta Report, *supra* note 8 at 54.
[52] New South Wales Report, *supra* note 2 at para 4.23.
[53] Uniform Act, *supra* note 9.

In the Commission's view, a defendant who makes a reasonable settlement with a plaintiff clearly should be entitled to contribution from a second defendant who is liable to the plaintiff, even if the first is found after the settlement not to have been liable. A settling defendant should not have to provide evidence that he or she could not have resisted the claim at trial. Otherwise, a non-settling defendant who later admits or is found to have 100 percent liability could defeat entirely the settling defendant's claim for contribution.[54]

The Ontario Law Reform Commission raised the concern of a defendant who settles with a potential plaintiff although certain in the knowledge that he or she is not liable, perhaps to preserve goodwill in a commercial relationship,[55] or because of collusion.[56] In the Manitoba Commission's opinion, a provision that contribution will be in the amount that the court considers just and equitable in the circumstances would address these concerns.

RECOMMENDATION 20

The Act should provide that a person who gives consideration for a release of a claim is entitled to contribution as set out in Recommendation 19, whether or not the person was liable to the person to whom consideration is given.

E. CONTRIBUTION AFTER JUDGMENT

The Commission has recommended that, to discourage multiple actions, a plaintiff who receives a judgment in which the whole of his or her damages are assessed should not be entitled to have damages assessed in a higher amount in proceedings against any other defendant.

With respect to contribution proceedings, the factors at play are different; the concern is not with the plaintiff but with achieving fairness and equity between the defendants. Where there has been a settlement, the Commission has recommended that the settling defendant should be able to claim contribution from non-settling defendants, in the amount that the court considers to be just and equitable. In the case of a partial settlement, a settling defendant should remain liable to contribution to, and have a right of contribution from, a non-settling defendant.

Where a defendant must pay compensation to a plaintiff under a judgment and claims contribution from a subsequent defendant, there is an argument that the subsequent defendant should also be able to contest the damages awarded against the first. The New South Wales Law Reform Commission considered this issue in the context of the High Court of Australia decision in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*.[57] In that case, the Court held that a second defendant may challenge the quantum of damages

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[54] See *Hannigan v City of Edmonton* (1983), 47 AR 266 (ABQB).
[55] Ontario Report, *supra* note 2 at 96.
[56] Hong Kong Report, *supra* note 2 at para 5.12; UK Report, *supra* note 2 at paras 52-57.
[57] *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1954) 92 CLR 200.

awarded against the first defendant in the first proceeding in order to determine what is 'just and equitable' under the New South Wales Act.[58] The Court said:

> The Court ... is required to find what is just and equitable as an amount of contribution having regard to the extent of the responsibility for the damage of the tortfeasor against whom the claim is made. There does not seem to be any valid reason why that tortfeasor may not say to the tortfeasor making the claim, if he has improvidently agreed to pay too large an amount or by unreasonable or negligent conduct in litigation has incurred or submitted to an excessive verdict, that the excess is due to his fault and not to that of the tortfeasor resisting the claim. It would be a matter for the Court to consider under the heading of "just and equitable".[59]

This position was accepted by the New South Wales Commission, the Ontario Law Reform Commission and the New Zealand Law Commission.[60] The Commission agrees that it is a reasonable approach.

RECOMMENDATION 21

The Act should provide that in contribution proceedings brought by a person against another person liable in respect of the same damages after the satisfaction of a judgment, the person from whom contribution is claimed is entitled to contest the assessment of damages in the first proceedings as being unreasonable in the circumstances.

F. CONTRIBUTION WHERE THE CLAIM IS LIMITED OR BARRED

1. Contribution Where the Amount of the Claim is Limited by Contract

Law reform bodies in Alberta, Ontario, the United Kingdom, Scotland, New Zealand, New South Wales, South Australia and Hong Kong have agreed that a defendant whose liability to the plaintiff is limited by a contract entered into before the loss occurred should not be required to pay contribution in an amount that exceeds the maximum set by the contract.[61] This is consistent with the principle that a defendant is only liable to pay contribution if he or she is in

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[58] *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s 5(2).

[59] *Supra* note 57 at 212-13.

[60] New South Wales Report, *supra* note 2 at para 4.12; Ontario Report, *supra* note 2 at 116; New Zealand Report, *supra* note 2 at 30. This approach was also implemented in the Irish *Civil Liability Act, 1961*, s 29, although an exception applies where the person from whom contribution is sought knew of the original claim and "unreasonably failed to make a proposal for assisting ... in the defence of the action": s 29(3).

[61] Alberta Report, *supra* note 8 at 72-73; Ontario Report, *supra* note 2 at 129-135; UK Report, *supra* note 2 at paras 71-74; Scotland Report, *supra* note 2 at paras 3.37-3.40; New Zealand Report, *supra* note 2 at 32-33; New South Wales Report, *supra* note 2 at 3.18-3.21; South Australia Report, *supra* note 2 at 11-12; Hong Kong Report, *supra* note 2 at paras 8.2-8.6. See the *Civil Liability (Contribution) Act 1978* (UK), c 47, s 2(3). This would not affect the plaintiff's right to full recovery from other defendants liable for the loss under principles of joint and several liability. The BC Report, however, *supra* note 2, recommended that the plaintiff's recovery be reduced where one defendant's liability is limited by contract.

fact liable to the plaintiff; a defendant whose liability is completely excluded by the terms of a contract is not liable to pay any contribution. Similarly, contracts may exist among defendants that address the parties' liability to pay contribution.

The Commission agrees that there is no need to interfere with the freedom of parties to enter into contractual arrangements as they see fit, and that the terms of the contract should prevail.

RECOMMENDATION 22

The right to contribution under the Act should be subject to any existing contract between the person suffering the damage or the person claiming contribution and the person from whom contribution is claimed.

2. Contribution Where the Claim is Barred by a Limitation

A difficult situation arises when a defendant who has compensated a plaintiff for his or her injury wishes to claim contribution from a second concurrent wrongdoer, but the claim of the plaintiff against the second wrongdoer is barred by a limitation in a statute. The second wrongdoer is entitled to the security from suit provided by the limitation. On the other hand, it seems clearly unjust to prohibit the first defendant from claiming compensation before having a reasonable opportunity to do so, and perhaps before becoming aware that any grounds exist to make a claim. There is also a concern that a plaintiff should not have the right to choose through the timing of litigation whether the first defendant will have the ability to make a contribution claim against other liable wrongdoers.

The Institute of Law Research and Reform of Alberta recommended that a defendant should be able to claim contribution from a second wrongdoer even though the claim of the plaintiff against the second wrongdoer is barred by a statutory limitation or provision for notice. However, to preserve certainty and finality, the defendant claiming contribution should be required to serve a third party notice within six months of being served with a statement of claim.[62]

The United Kingdom Law Commission and the Law Reform Commission of Hong Kong proposed a broad right to contribution, consistent with United Kingdom case law, recommending that contribution should be recoverable from any person who was liable to the injured party at the time that the damage occurred.[63] This has been held to be the law in New South Wales, based

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[62] The Institute noted the "inherent problem" in the proposal - that after the second defendant's limitation has expired, the first defendant will lose the right to claim contribution if he or she settles without being sued: Alberta Report, *supra* note 8 at 71.

[63] UK Report, *supra* note 2 at para 59 (the Commission did not address limitation periods for contribution claims); Hong Kong Report, *supra* note 2, para 6.2. This is the result in most circumstances under the *Civil Liability (Contribution) Act 1978* (UK), c 47, s 1(3), although the wording is confusing and could be clarified: see Hong Kong Report, paras 6.3-6.4.

on the wording in that Act, which is identical to the English and Manitoba Acts: a contribution claim may be made against someone "who would, if sued, have been liable".[64] The phrase was held to mean that a contribution claim may be made if there was a time at which the plaintiff could have successfully sued the defendant from whom contribution is claimed.[65] The Ontario Law Reform Commission, New South Wales Law Reform Commission and Law Commission of New Zealand similarly concluded that a person should remain liable to pay contribution despite the expiry of a limitation in relation to the plaintiff.[66]

The British Columbia Court of Appeal has also agreed that the expiry of a limitation with respect to a plaintiff and a wrongdoer should not bar another wrongdoer from claiming contribution, reasoning that the failure of the plaintiff to take action after the tortious event should not impair the right of a wrongdoer to contribution:

> Section 4(2)(b) of the Act creates an independent right of contribution as between the defendants and the respondents since the plaintiff had a cause of action against each of them when the alleged tort occurred. The objective of that right is to ensure that any damages established by the plaintiff will be shared equitably among concurrent tortfeasors according to their degree of fault. There is no principled reason why the post-tort conduct of the plaintiff in failing to join the respondents as defendants before the limitation period against them expired should interfere with the defendants' right of contribution.[67]

On the other hand, courts in Alberta (which also shares the wording of the Manitoba Act) have held that a claim for contribution cannot be made against a person if the plaintiff is barred by a limitation or notice requirement from suing that person directly.[68] The rights of the defendant claiming contribution are co-extensive with those of the plaintiff.[69] In a recent decision, the Alberta Court of Appeal conducted an extensive review of the authorities, concluding that a wrongdoer has no liability to the plaintiff, and no liability to contribute to another wrongdoer, if protected by a procedural bar from a judgment in favour of the plaintiff. The bar may be a statutory or contractual limitation period, a statutory protection because of a failure to give timely notice or a contractual exculpatory clause:

> As some of the Alberta cases explain, this bar to indemnity claims makes the law consistent. Someone not directly liable to the plaintiff should not be liable in a suit brought by the plaintiff, and so indirectly have to pay the plaintiff on the forbidden claim. The plaintiff and the defendant claiming contribution cannot do indirectly what is forbidden directly. If it were not so, the plaintiff could sue someone with no funds and slight liability. The plaintiff would know that that defendant would almost

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[64] *Supra* note 58, s 5(1)(c).
[65] *Brambles Constructions Pty Ltd v Helmers*, [1966] HCA 3, (1966) 114 CLR 213.
[66] Ontario Report, *supra* note 2 at 157; New South Wales Report, *supra* note 2 at para 4.45; New Zealand Report, *supra* note 2 at 32.
[67] *The Owners, Strata Plan LMS 1751 v Scott Management Ltd*, 2010 BCCA 192 at para 57; leave to appeal to SCC refused, *Sealed Air (Canada) Co/Cie v Scott Management Ltd and JC Scott Construction Ltd*, [2010] SCCA No 215.
[68] *Canada Deposit Insurance Corp v Prisco*, [1996] AJ No 241 (CA); see also *Parkland (County) No 31 v Stetar*, [1975] 2 SCR 884.
[69] *Canada Deposit Insurance Corp v Prisco*, *ibid* at para 28.

> certainly get and pay the plaintiff funds, by claiming indemnity from a tortfeasor solvent but immune from direct liability.[70]

In Ontario, before the *Limitations Act, 2002*[71] was enacted, section 8 of the *Negligence Act*[72] provided that a defendant could claim contribution from another wrongdoer even though the limitation period between the plaintiff and that wrongdoer had expired, if the contribution claim was brought within one year of the judgment between the plaintiff and defendant and any statute requiring notice of a claim had been complied with.[73] In *HSBC Securities (Canada) v Davies, Ward & Beck*, the Ontario Court of Appeal described this as an attempt to prevent contribution rights from failing due to statutory limitations if the main action is commenced in a timely way:

> Protecting contribution rights only where the main action is timely makes sense for two reasons: first, because it will be rare, to say the least, for an action commenced after the expiry of a relevant statutory limitation period to result in a judgment or settlement against a defendant; and second, because long-standing public policy requires the timely exercise of rights by imposing limitations on the bringing of legal proceedings.
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> ...
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> The purpose of s. 8 is the protection of the right to contribution from defeat by statutory limitation periods, which may, in many conceivable circumstances, expire before the claimant for contribution is even aware of the main action.[74]

Section 8 of the *Negligence Act* was repealed by the *Limitations Act, 2002*, although that Act did not specifically preserve the right to bring a claim for contribution after the expiry of the limitation period between the plaintiff and the person from whom contribution is claimed. In *Waterloo Region District School Board v Truax Engineering Ltd*,[75] the Ontario Court of Appeal held that the *Limitations Act, 2002* has the same effect as the earlier provision, notwithstanding the lack of specific language.

The *Limitations Act, 2002* set a new streamlined limitations regime for Ontario with a basic two year limitation that runs from the date the claim was, or ought to have been, discovered. The ultimate limitation of 15 years runs from the day on which the act or omission on which the claim is based took place. With respect to claims for contribution, section 18 provides that a person claiming contribution is presumed to have discovered his or her claim against another wrongdoer when the person is served with the claim in respect of which

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[70] *Howalta Electrical Services v CDI Career Development Institutes Ltd*, 2011 ABCA 234, 515 AR 163 at para 38. O'Ferrall, JA, in a minority judgment, suggested that a claim for contribution might arise if two or more defendants are liable to each other for the damage suffered by the plaintiff.

[71] *Limitations Act*, SO 2002, c 24, Sched B.

[72] Ontario Act, *supra* note 25.

[73] In *Waterloo Region District School Board v Truax Engineering Ltd*, 2010 ONCA 838, the Court explained that the former section 8 of the *Negligence Act* had been added in 1948 to address limitation problem perceived to arise from the cases of *Cohen v McCord*, [1944] OR 568 (CA) and *Magee v Canada Coach Lines Ltd*, [1946] OWN 73 (Ont HC).

[74] *HSBC Securities (Canada) v Davies, Ward & Beck* (2005), 74 OR (3d) 295, 249 DLR (4th) 571 at paras 63, 66.

[75] *Supra* note 73.

contribution and indemnity is sought. The two year basic limitation for contribution claims thus begins to run from service of the plaintiff's claim.[76]

In *Waterloo Region District School Board*, the Court noted that nothing in the Act or in the working papers at the time of its drafting suggested that there was an intent to change the effect of section 8 of the *Negligence Act*, other than with a two year limitation and a new commencement date:

> If the court were to conclude that, despite the clear wording of s. 18 [of the *Limitations Act, 2002*], there is a further limitation period that applies to claims for contribution and indemnity against a concurrent tortfeasor in negligence, and that such claims must also be brought before the expiry of the limitation period applicable to the plaintiff's claim against that tortfeasor, the effect of a universal limitation period for contribution and indemnity claims in s. 18 would be abrogated and the clarity and efficacy of the section undermined.
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> ...
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> The effect of the new provision is that the period for bringing the claim for contribution and indemnity now coincides much more closely with the basic limitation for bringing all actions, and procedurally, it is contemplated that all claims arising out of the incident that caused the injury will be tried and disposed of together. Therefore, to the extent that a claim for contribution and indemnity may be brought beyond the limitation period that applied to the plaintiff's potential claim against a particular tortfeasor, the extension is minimized by the operation of s. 18 and any negative consequences to the tortfeasor by being brought into an action after he or she could have been sued by the plaintiff are minimized as well.[77]

In its *Limitations* report, the Commission examined the Ontario *Limitations Act, 2002* and other 'modern' limitations regimes in other jurisdictions, and recommended the adoption of a new *Limitations Act* for Manitoba.[78] As in other modern regimes, the Commission recommended the abolition of the various categories of claims set out in the current *Limitation of Actions Act*,[79] and their replacement with a single, basic two year limitation applicable to all claims unless they are otherwise dealt with. This two year limitation would begin running when the existence of a claim was discovered or discoverable, instead of when the cause of action arose. In order to serve the repose goal of limitations legislation, the Commission also recommended that the new Act provide for a 15 year ultimate limitation, running from the date on which the act or omission on which the claim is based took place.

With respect to claims for contribution, the Commission concluded in the *Limitations* report that:

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[76] *Limitations Act, 2002*, *supra* note 71. Section 18 provides that the day on which the person claiming contribution is served with the claim for which contribution is sought is deemed to be the day the act or omission on which that person's claim is based took place. Subsection 5(2) provides that a person with a claim is presumed, unless the contrary is proved, to have discovered his or her claim on the day the act or omission on which the claim is based took place.

[77] *Supra* note 73 at para 26.

[78] Manitoba Law Reform Commission, *Limitations* (Report No 123, 2010).

[79] *Limitation of Actions Act*, RSM 1987, c L 150.

> ... the appropriate trigger for the commencement of the limitation for discoverability purposes is the determination of the claimant's liability for the original loss. The Commission considers that the day of the 'injury', for the purposes of the two year discoverability period, should be the day on which the liability of the claimant, through tort or otherwise, is confirmed by a court judgment, arbitration award or settlement. The ultimate limitation should begin when the claimant is served with a claim or a notice that commences an arbitration, or incurs a liability through a settlement agreement, in respect of the matter for which contribution and indemnity is sought.[80]

The Commission believes that this recommendation continues to be appropriate. As the Ontario Court of Appeal concluded, no further statutory limitation should apply to a claim for contribution; in other words, there should be no requirement that a claim for contribution against a concurrent wrongdoer be made before the limitation applicable to the plaintiff's claim against that wrongdoer expires. This is also the result under the federal *Marine Liability Act*.[81]

The current *Limitation of Actions Act* similarly sets a limit for a claim of contribution between tortfeasors of two years from the date on which a judgment or award of arbitration is given or the date on which an amount to be paid in settlement is agreed upon. The provisions have given rise to a 'timing' issue, as to whether there is a bar to a contribution claim being made before one of these triggers occurs. Manitoba courts have held that this is not the preferred interpretation, and that defendants are not statute-barred in bringing third party proceedings. The interpretation that carries "a ring of practicality and common sense"[82] is that "an action can be commenced at any time before, but no later than two years after liability is established".[83] The Commission supports this view.

With respect to statutory provisions requiring the plaintiff to give notice within a period of time in order to preserve his or her right to an action, the Commission has recommended that the government review other statutes that create a right of action for damages to determine whether changes are needed for consistency with the principles in this report. The review should also assess whether it is necessary under the scheme of any Act that a notice requirement take precedence over our recommendation with respect to statutory limitations and contribution claims.

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[80] *Supra* note 78 at 65-66. This is consistent with recommendations in the UK, Western Australia and Hong Kong: UK, Law Commission, *Limitation of Actions* (Report No 270, 2001) at paras 480-482; Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions* (Project No 36 Part II, 1997) at para 12.64-65; Hong Kong Report, *supra* note 2 at paras 5.17-5.19.

[81] *Supra* note 37, s 20; however, the limitation in the *Marine Liability Act* is one year from the date of judgment or settlement. Note that in the *Limitations* report, the Commission recommended that parties should be permitted to agree to lengthen, but not to shorten, limitations: *supra* note 78 at 52.

[82] *Investors Group Trust v Gordon* (1998), 169 DLR (4th) 462 at para 16; see also *Chlysta v Ukrainian National Federation Club*, 2005 MBQB 125.

[83] *Investors Group Trust v Gordon*, *ibid* at para 17.

RECOMMENDATION 23

The limitations recommended in the Limitations report with respect to claims for contribution and indemnity should be implemented in a new Limitations Act.

RECOMMENDATION 24

The Act should be clear that a claim for contribution may be commenced at any time before the expiry of the limitation that applies to it, and that there is no bar to making a contribution claim before the limitation applying to the claim begins to run.

RECOMMENDATION 25

Manitoba statutes should be reviewed to determine whether it is necessary under the scheme of any Act that a notice requirement take precedence over the recommendations in this report with respect to statutory limitations and contribution claims.

CHAPTER 6

LIST OF RECOMMENDATIONS

1. *The Tortfeasors and Contributory Negligence Act* should be repealed and replaced with a new *Contributory Fault Act*. (p. 10)

2. Apportionment under the Act should be based on the relative blameworthiness and causal relevance of the person's conduct, as the court finds just and equitable. (p. 12)

3. The Act should provide that where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court may, after determining the degree to which the fault of each concurrent wrongdoer contributed to the damage, make an order apportioning the contribution that cannot be collected among the other concurrent wrongdoers, in proportion to the degrees in which their fault contributed to the damage. (p. 26)

4. The Act should clearly abolish the last clear chance doctrine. (p. 32)

5. The Act should refer to a person's "fault" and not to a person's "negligence". (p. 33)

6. The Act should define the term "fault", using the *Uniform Contributory Fault Act* definition as a model with necessary modifications. (p. 34)

7. The Act should provide for apportionment of damages for contributory fault in respect of intentional torts and torts that are crimes as well as those that are framed in negligence. (p. 38)

8. The Act should provide for apportionment of damages for contributory fault in respect of strict liability torts. (p. 40)

9. The contributory fault of a person under the Act should include fault for which the person is vicariously responsible. (p. 41)

10. The Act should not provide for apportionment of damages for contributory fault in respect of breaches of fiduciary duty. The Commission refrains from recommending statutory intervention with the intent that equitable principles in this area will continue to evolve. (p. 44)

11. The Act should include a provision clarifying that nothing in the Act should be interpreted as affecting a remedy that is available in equity. (p. 45)

12. The Act should provide for apportionment of damages for contributory fault in respect of any breach of contract that creates a liability for damages. (p. 55)

13. The Act should not provide for apportionment of damages for contributory fault in respect of a breach of a statutory duty that creates a liability for damages. (p. 56)

14. All Manitoba statutes that create a right of action for damages should be reviewed for consistency with the recommendations in this report and the apportionment principles in the Act. (p. 56)

15. Any person liable in respect of any damage suffered by another person should have a right to recover contribution from any other person liable in respect of the same damage. (p. 60)

16. The Act should not deal with the release bar rule or the judgment bar rule. (p. 61)

17. The Act should define 'judgment' as a decision that finally disposes of all or part of an application or action on its merits or by consent of the parties, including a judgment in consequence of the default of a party. (p. 63)

18. The Act should provide that a person who receives a judgment against a concurrent wrongdoer in which the whole of his or her damages are assessed is not entitled to have damages assessed in a higher amount in proceedings against any other concurrent wrongdoer. (p. 63)

19. The Act should provide that a person who gives consideration for a release of a claim

    (a) has a right to recover contribution from another person liable in respect of the same damage; and

    (b) is liable to pay contribution to another person liable in respect of the same damage,

    in the amount that the court considers to be just and equitable having regard to the degree to which the fault of each person contributed to the damage. (p. 67)

20. The Act should provide that a person who gives consideration for a release of a claim is entitled to contribution as set out in recommendation 16, whether or not the person was liable to the person to whom consideration is given. (p. 70)

21. The Act should provide that in contribution proceedings brought by a person against another person liable in respect of the same damages after the satisfaction of a judgment, the person from whom contribution is claimed is entitled to contest the assessment of damages in the first proceedings as being unreasonable in the circumstances. (p. 71)

22. The right to contribution under the Act should be subject to any existing contract between the person suffering the damage or the person claiming contribution and the person from whom contribution is claimed. (p. 72)

23. The limitations recommended in the *Limitations* report with respect to claims for contribution and indemnity should be implemented in a new *Limitations Act*. (p. 77)

24. The Act should be clear that a claim for contribution may be commenced at any time before the expiry of the limitation that applies to it, and that making a contribution claim before the limitation applying to the claim begins to run. (p. 77)

25. Manitoba statutes should be reviewed to determine whether it is necessary under the scheme of any Act that a notice requirement take precedence over the recommendations in this report with respect to statutory limitations and contribution claims. (p. 77)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 26th day of September, 2013.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
Jacqueline Collins, Commissioner

"Original Signed by"
Michelle Gallant, Commissioner

"Original Signed by"
John C. Irvine, Commissioner

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Gerald O. Jewers, Commissioner

"Original Signed by"
Myrna Phillips, Commissioner

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Perry W. Schulman, Commissioner

CONTRIBUTORY FAULT: THE TORTFEASORS AND CONTRIBUTORY NEGLIGENCE ACT

EXECUTIVE SUMMARY

In the *Contributory Fault: Tortfeasors and Contributory Negligence Act* report, the Manitoba Law Reform Commission sets out 25 recommendations to modernize the law of contribution among tortfeasors and the rules relating to contributory negligence.

Tort law deals with civil wrongs and how persons who have been injured by the wrongful conduct of others should be compensated. A person may be liable to compensate another under tort law as a result of his or her negligent or intentional conduct, or under principles of strict liability. When the elements of tort are established, the costs of the injury resulting from the tort are allocated between defendant(s) at fault, and the plaintiff who suffered the harm if he or she contributed in some way to the injury. The rules relating to contribution among tortfeasors and contributory negligence determine this allocation of damages.

In 1939, Manitoba enacted legislation to alleviate the harsh common rules governing contribution among tortfeasors and contributory negligence. The Act has been amended only twice since that time, in 1973 and in 1980. The Commission suggests that a revision of Manitoba's *Tortfeasors and Contributory Negligence Act* is now appropriate, given the developments in the law in the decades since the early reforms. It recommends the enactment of a new statute entitled the *Contributory Fault Act*.

The Commission's recommendations include the following important clarifications:

- The new Act should refer to a person's fault, rather than negligence, and include a definition of the term "fault".

- The new Act should clearly abolish the last clear chance doctrine.

- The new Act should extend the principles of contributory fault to intentional torts, strict liability torts, fault for which a person is vicariously responsible, and breach of contract.

In addition, the Commission makes several recommendations to improve the fairness and efficiency of rules governing contribution among tortfeasors, and to clarify the limitation periods applicable to claims for contribution.

Significantly, the Commission does not recommend the extension of principles of contributory fault to breaches of fiduciary duty. In reaching this decision, the Commission considered the continuing evolution of the law in this area, and recommends that the statute be clear that it does not affect a remedy available in equity.

The Commission also declined to recommend that the rules of contributory fault be extended to breaches of statutory duty that create a liability for damages.

The Commission considers that the recommendations in this report will help to modernize, rationalize and improve the fairness and efficiency of the rules governing allocation of damages among civil litigants in Manitoba.

RÉSUMÉ

Dans son rapport intitulé *Contributory Fault: Tortfeasors and Contributory Negligence Act* (faute contributive : la *Loi sur les auteurs de délits civils et la négligence contributive*), la Commission de réforme du droit du Manitoba énonce 25 recommandations visant à moderniser le droit en matière d'établissement des contributions des auteurs de délits civils et les règles relatives à la négligence contributive.

Le droit des délits civils traite des transgressions civiles et de la façon d'indemniser la personne qui a subi un préjudice causé par la conduite transgressive d'autrui. En droit des délits civils, une personne peut être tenue d'en indemniser une autre en raison de sa conduite négligente ou intentionnelle, ou conformément aux principes de la responsabilité inconditionnelle. Lorsque les éléments du délit civil sont établis, les coûts liés au préjudice causé par le délit sont répartis entre les défendeurs fautifs et le demandeur qui a subi le préjudice, s'il a contribué à celui-ci de quelque façon. Les règles relatives à l'établissement des contributions des auteurs de délits civils et à la négligence contributive déterminent cette répartition des dommages-intérêts.

En 1939, le Manitoba a édicté une loi pour adoucir les règles de common law sévères qui régissaient l'établissement des contributions des auteurs de délits civils et la négligence contributive. Cette loi n'a été modifiée que deux fois depuis, en 1973 et en 1980. La Commission suggère qu'une révision de la *Loi sur les auteurs de délits civils et la négligence contributive* du Manitoba est maintenant appropriée, étant donné l'évolution du droit au cours des décennies écoulées depuis les premières réformes. Elle recommande l'édiction d'une nouvelle loi sur la faute contributive qui serait intitulée *Contributory Fault Act* en anglais.

Les recommandations de la Commission comprennent les précisions importantes, notamment :

- La nouvelle loi devrait mentionner la faute d'une personne plutôt que sa négligence, et comprendre une définition du terme « faute ».

- La nouvelle loi devrait clairement abolir la doctrine de la dernière chance.

- La nouvelle loi devrait étendre les principes de la faute contributive au délit civil intentionnel, au délit de responsabilité stricte, à la faute à l'égard de laquelle une personne est responsable du fait d'autrui et à la violation de contrat.

En outre, la Commission fait plusieurs recommandations visant à améliorer l'équité et l'efficacité des règles régissant l'établissement des contributions des auteurs de délits civils, ainsi qu'à préciser les délais de prescription applicables aux demandes d'établissement des contributions.

Fait important, la Commission ne recommande pas l'application des principes de la faute contributive à la violation du devoir fiducial. Pour en arriver à cette décision, la Commission a examiné l'évolution continue du droit dans ce domaine, et elle recommande de faire en sorte que la loi précise qu'elle ne porte pas atteinte à tout recours disponible en équité.

La Commission a aussi refusé de recommander d'étendre les règles de la faute contributive à tout manquement à l'obligation d'origine législative qui crée une responsabilité en dommages-intérêts.

La Commission estime que les recommandations de son rapport contribueront à moderniser, à rationaliser et à améliorer l'équité et l'efficacité des règles régissant la répartition des dommages-intérêts entre les parties aux litiges civils qui surviennent au Manitoba.